SUPREME COURT, U. S.

No. 1218

MAR 11 1968

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1967

PHILIP C. ANDERSON, et al., *Appellants*

v.

NORBERT TIEMANN, et al.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF NEBRASKA

JURISDICTIONAL STATEMENT

RAY C. SIMMONS,
214 Fremont National Bank Bldg.
Fremont, Nebraska
Attorney for Appellants

GANT PUBLISHING CO., Lincoln, Nebraska

INDEX

Subject Index

	Page
Opinion Below	1
Jurisdiction	1
Statutory Provisions Involved	2
Questions Presented	4
Statement	6
The Questions are Substantial	6
The Questions are Important	22
Conclusion	23
Appendix A	24

Cases Cited

Alaska Steamship Co. v. Mullaney, 180 F. 2d 805 (C. A. 9, 1950)	19
Anderson v. Tiemann, 182 Neb. 393, 155 N. W. 2d 322	1, 24
Bantam Books, Inc. v. Sullivan, 372 U. S. 58, 9 L. Ed. 2d 584, 83 S. Ct. 631 (1963)	2
Borden v. Selden, 146 N. W. 2d 306 (Iowa 1966)	11, 12
Brock v. Superior Court, 71 P. 2d 209 (Cal. 1937)	16
Burge v. Marcum, 394 S. W. 2d 908 (Ky. 1965)	12
Carter v. Carter Coal Co., 298 U. S. 238, 56 S. Ct. 855	18
City of Cleveland v. Piskura, 60 N. E. 2d 919 (Ohio 1945)	16
Commonwealth v. Warner Bros. Theatres, Inc. (Pa. 1942), 27 A. 2d 62	16
Crowly v. Thornbrough, 294 S. W. 2d 62 (Ark. 1956)	15
Darweger v. Staats, 267 N. Y. 290	21
Darweger v. Staats, 275 N. Y. S. 394	17
Dawson v. Hamilton, 314 S. W. 2d 532 (Kent. 1958)	16
Dearborn Independent v. City of Dearborn, 49 N. W. 2d 370 (Mich. 1951)	16

Page

Featherstone v. Norman (Ga. 1930), 153 S. E. 58 -- 16
Florida Industrial Commission v. State, 21 S. 2d 599 (Fla. 1945) ---------- 16
Head v. McKenney, 6 S. E. 2d 405 (Ga. 1939) ------ 16
Holgate Bros. Co. v. Bashore, 200 Atl. 672 (Pa. 1938) 16
Hutchins v. Mayo, 197 So. 495 (Fla. 1940) ---------- 16
Idaho Saving & Loan Association v. Roden, 350 P. 2d 225 (Ia. 1960) ---------- 16
Knickerbocker Ice Co. v. Stewart, 253 U. S. 149, 40 S. Ct. 438, 64 L. Ed. 834 ---------- 18
Opinion of the Judges, 140 N. W. 2d 34 (S. D. 1966) 13, 21
Opinion of the Justices, 239 Mass. 606 ----------17, 20
Santee Mills v. Query, 115 S. E. 202 (S. C. 1922) -- 16
Seale v. McKennon, 336 P. 2d 340 (Ore. 1959) ---- 16
Smithberger v. Banning, 129 Neb. 651, 262 N. W. 492 (1935) ----------15, 17
State v. Ashby, 387 P. 2d 588 (N. M. 1963) -------- 10
State v. Bertsen, 200 P. 2d 1007 (Ida. 1948) -------- 10
State v. Intoxicating Liquors, 117 A. 588 (Me. 1922) 16
State v. Urquhart, 310 P. 2d 261 (Wash. 1957) ---- 16
State v. Webber, 133 A. 738 (Me. 1926) ---------- 16
Travis v. Yale & Towne Mfg. Co., 252 U. S. 60, 40 S. Ct. 228, 64 L. Ed. 460 (1920) --5, 7, 9, 10, 12, 13, 22

Constitution Cited

Art. IV, Sec. 2, Constitution of U. S. ---------- 7
Art. IV, Sec. 4, Constitution of U. S. ---------- 20
Tenth Amendment, Constitution of U. S. ----------5, 18
Fourteenth Amendment, Constitution of U. S. ------5, 7
Art. VIII, Sec. 1B, Constitution of Nebraska ------ 4

Statutes Cited

28 U. S. C., Section 1257(2) ---------- 2

Page

Legislative Bill 377, 1967 Session of Nebraska Legislature ---------- 2, 3, 4, 6, 7
Vol. 2, Revised Statutes of Neb., Reissue 1964, p. 5, sec. 4., Enabling Act of Congress ---------- 4, 20

Texts Cited

16 Am. Jur. 2d, Constitutional Law, Sec. 516, p. 902 9
42 Am. Jur., Public Administrative Law, Sec. 45, p. 342 ---------- 19
12 A. L. R. 1435 ---------- 19
54 A. L. R. 1104 ---------- 19
92 A. L. R. 400 ---------- 19
16A C. J. S., Constitutional Law, Sec. 478b, p. 222 -- 9

IN THE

Supreme Court of the United States

October Term, 1967

No. ------

PHILIP C. ANDERSON, et al., *Appellants*

v.

NORBERT TIEMANN, et al.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF NEBRASKA

JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the Supreme Court of the State of Nebraska appears in 182 Neb. 393, 155 N. W. 2d 322, a copy of which appears here as Appendix A.

JURISDICTION

The decision of the Supreme Court of the State of Nebraska was entered on December 22, 1967, affirming a decree of the District Court of Lancaster County, Nebraska. A motion for rehearing was filed by the appellants on January 10, 1968, which motion was overruled by the Supreme Court of the State of Nebraska on February 13, 1968. Notice of appeal was filed by the appellants in the

Supreme Court of the State of Nebraska on February 15, 1968. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1257(2). *Bantam Books, Inc. v. Sullivan,* 372 U. S. 58, 9 L. Ed. 2d 584, 83 S. Ct. 631 (1963).

STATUTORY PROVISIONS INVOLVED

The 1967 session of the Nebraska Legislature enacted Legislative Bill 377, which became law April 12, 1967. Laws of Nebraska 1967, Page 1533. The Bill contains three parts, a "Sales and Use Tax," covering Sections 1-13; an "Income Tax", covering Sections 14-124; and "General Provisions", covering Sections 125-137.

This action challenges the constitutionality of the Income Tax provisions. The provisions of the bill dealing with a sales and use tax, and the "General Provisions" are not challenged.

There are three constitutional objections to the income tax provisions. First, a challenge is made against the "food sales tax credit", a credit against tax which is allowed to all residents but denied to all nonresidents, thus discriminating against the latter. Second, the Nebraska income tax is a percentage of the federal income tax under the federal income tax laws as existing and as changed from time to time in the future Appellants contend that this is an unlawful delegation of state legislative power to the federal Congress, contrary to the federal Constitution. Third, a closely related contention, appellants contend that the delegation of state legislative powers to the federal Congress just described violates the compact between the State of Nebraska and the federal government at the time Nebraska was admitted into the Union as to the requirement that Nebraska have a "republican" form of government.

As for the first contention, regarding the "food sales tax credit", appellants challenge Section 15(2) and (3)(a), which provide as follows:

> (2) (a) A resident of this state shall mean an individual who is domiciled in Nebraska or who maintains a permanent place of abode in this state and spends in the aggregate more than six months of the taxable year in this state; and
>
> (b) A nonresident shall mean an individual who is not a resident of this state.
>
> (3) (a) *There shall also be allowed to resident individuals as a credit against the tax imposed by this act, a food sales tax credit equal to seven dollars multiplied by the number of allowable personal exemptions claimed for individuals who are residents,* exclusive of the extra exemptions allowable for age or blindness. A refund shall be allowed to the extent that the food sales tax credit exceeds the income tax payable by the resident individual for the taxable year but no *refund shall be made* in any amount less than two dollars.

As to the second and third contentions, that there is an unlawful delegation of legislative authority to the federal Congress and that such unlawful delegation constitutes a breach of the compact between the State of Nebraska and the federal government that Nebraska have a "republican" form of government, there is involved the following provision from Section 14 of Legislative Bill 377:

> "Sec. 14. Any term used in sections 14 to 124 of this act shall have the same meaning as when used in a comparable context in the laws of the United States relating to federal income taxes, unless a different meaning is clearly required. Any reference to the laws of the United States shall mean the provisions of the Internal Revenue Code of 1954, and amendments thereto, other provisions of the laws of the United

States relating to federal income taxes, and the rules and regulations issued under such laws, *as the same may be or become effective, at any time or from time to time, for the taxable year.* * * *"

Also involved is the following from Section 15(1) of the Bill:

"Sec. 15. (1) A tax is hereby imposed for each taxable year on the entire income of every resident individual of this state and on the income of every nonresident individual of this state which is derived from sources within this state. *The tax shall be a flat percentage of,* for each resident individual, *the taxpayer's adjusted federal income tax liability for the taxable year* * * *."

Also involved is Article VIII, Section 1B, of the Constitution of the State of Nebraska:

"Sec. 1B. Income tax; may be based upon the laws of the United States. When an income tax is adopted by the Legislature, the Legislature may adopt an income tax based upon the laws of the United States. (Adopted 1966)"

As to the third contention that there is a violation of Nebraska's compact with the federal government on the admission to the union requiring it to have a "republican" form of government there is involved an Enabling Act of Congress which appears in Volume 2 of the Revised Statutes of Nebraska, Reissue of 1964, Page 5, Section 4, which among other conditions requires that the Nebraska Constitution "when formed *shall be republican,* and not repugnant to the Constitution of the United States and the principles of the Declaration of Independence."

QUESTIONS PRESENTED

1. Nebraska's new income tax law provides for an income tax on residents and also on nonresidents for income

derived from sources within the state and provides for a very substantial credit against this tax for all residents, but excludes all nonresidents from receiving any such credit whatever. The question is whether this is discrimination which violates the due process, privileges and immunities, and equal protection clauses of the Constitution of the United States, and the decision of this Court in *Travis v. Yale & Towne Mfg. Co.*, 252 U. S. 60, 40 S. Ct. 228, 64 L. Ed. 460 (1920), and a long line of federal and state decisions since that time.

2. Nebraska's new income tax law adopts by reference the federal income tax laws and provides that Nebraska's state income tax shall be a percentage of the federal income tax owing under federal income tax laws "as the same may be or become effective, at any time or from time to time, for the taxable year." The Nebraska constitutional provision, as interpreted by the Nebraska Supreme Court, allowed Nebraska to base its state income tax on the federal income tax laws as now existing and as they may be changed from time to time in the future. The question is whether the provisions of the state income tax in adopting future federal laws are a violation of the Constitution of the United States in delegating state legislative power to the federal government in violation of the federal Constitution as to its Tenth Amendment, and the Fourteenth Amendment, as to its due process, privileges and immunities, and equal protection clauses.

3. Under the enabling legislation by which Nebraska became a state, it was required that Nebraska have a "republican" form of government. The question is whether the state income tax law which adopts future federal legislation is contrary to the requirement of a "republican" form of government so as to be in violation of the compact.

STATEMENT

Legislative Bill 377, Nebraska's new sales-income tax law became law April 12, 1967. This action was brought by five individuals and two Nebraska corporations challenging the validity of the income tax provisions of said bill under the Constitutions of the United States and Nebraska. Three of the plaintiffs are nonresidents of the State of Nebraska though subject to its income tax provisions. The defendants are Nebraska officials and the State Board of Equalization and Assessment, all given duties of enforcement under said bill. The action asks a decree invalidating all of the income tax provisions of the bill and enjoining its enforcement.

The District Court of Lancaster County, Nebraska, where the action was filed, held the income tax provisions entirely valid except for one minor provision which it held to be invalid under the Constitution of the State of Nebraska. The latter holding is not involved in this appeal. The Nebraska Supreme Court affirmed in all respects.

In this appeal three federal issues are raised. All three of these issues were raised from the beginning in pleadings in the District Court of Lancaster County, Nebraska, specifically and in detail, naming the federal constitutional provisions claimed to be violated, in Paragraphs 17 and 9 of the petition on which the case was tried. They were discussed at length in the briefs of the appellants at all stages and are discussed in the opinion of the Supreme Court of Nebraska, though the latter opinion does not answer a number of specific contentions made by the appellants.

THE QUESTIONS ARE SUBSTANTIAL

1. The "Food Sales Tax Credit" provisions allow a very

substantial credit to all residents of Nebraska but deny it to all nonresidents, thus discriminating against nonresidents, in violation of Article IV, Section 2, and the due process, privileges and immunities, and equal protection clauses of the Fourteenth Amendment and the Travis decision by this Court and a long line of unanimous authority in numerous jurisdictions.

Section 15(1) of the Nebraska Bill imposes an income tax on all residents of the state and upon nonresident individuals as to income derived from sources within Nebraska. As shown in the quoted portion of the Bill set forth earlier in this Jurisdictional Statement, Section 15(3)(a) allows a credit of $7.00 against tax multiplied by the number of allowable personal exemptions—but allows this credit only to residents, denying it to nonresidents. It further provides that a refund be allowed to residents to the extent that the credit exceeds the income tax payable by the resident, but denies such refund to nonresidents.

It should be stressed that this credit, called a "food sales tax credit" is a very substantial credit indeed. For a family of five it means a credit of $35.00. For a state tax rate set at ten per cent of the federal (the percentage currently set), it would be necessary for a family to earn sufficient income to owe $350.00 in federal income taxes before a state income tax would be owing. The federal income tax rate schedule shows that a family of five could earn $6,100 a year before it would be required to pay a $350 federal income tax and a $35.00 state income tax, so after applying the credit, unless a family of five earned in excess of $6,100 a year it would currently pay no Nebraska income tax at all. This would mean that approximately one half of the families of Nebraska are excluded from paying any state income tax at all because of the "food sales tax credit" provisions under the rate currently set.

Appellants Etherington and Bray are nonresidents of Nebraska, residing in Council Bluffs, Iowa, though they work full time in Omaha, Nebraska, each receiving annual income in excess of $6,000, each of them eating a substantial number of meals in Nebraska subject to Nebraska sales tax and substantial additional meals in Nebraska with their families, similarly taxed. The families of each of these appellants purchase between $500 and $1,000 per year in items purchased in Nebraska subject to Nebraska sales tax. No contention was raised by the defendants that these appellants did not show sufficient interest to challenge the constitutionality of the Nebraska income tax, nor did the Nebraska Supreme Court in its opinion so hold.

As shown in the statutory provisions earlier quoted in this Jurisdictional Statement, every person who maintains a permanent abode in Nebraska, spending in the aggregate more than six months of the taxable year in Nebraska is as the Nebraska Supreme Court opinion states "conclusively presumed" to have paid sales and use taxes equal to the maximum food sales tax credit allowable, so that all Nebraska residents receive the credit. Yet, the statutory provisions flatly exclude nonresidents from receiving this credit regardless how much taxes are paid by the nonresidents, including sales taxes and sales taxes upon food.

Such being the situation, it is the position of the appellants that the so-called "food sales tax credit" has absolutely nothing to do with sales tax on food or sales tax generally. Rather, the test is a person's residence—he receives the credit if he is a resident and he is excluded if he is a nonresident. Thus the term "food sales tax" is strictly surplusage and it would be more accurate to call the credit a "residence tax credit" since residence is the test. There will of course be some nonresidents of Nebraska residing outside the state yet who work in Nebraska

such as the plaintiffs Etherington and Bray, who will pay income tax upon the full amount of their income and will also pay very substantial Nebraska sales taxes. They are excluded from receiving the credit, though their co-workers, who are Nebraska residents, will receive the full credit.

As a practical matter the so-called food sales tax credit would operate exactly the same way whether or not Nebraska had a sales tax or a tax on food.

The decisions *unanimously* strike down the granting by states of tax credits to residents while denying them to nonresidents.

16A C. J. S., Constitutional Law Section 478b, page 222, states in the heading to that sub-section as follows:

> "b. Discrimination against Nonresidents
> "Any tax law which discriminates against nonresidents as such, in the rate of taxation, the mode of assessment and enforcement, and the allowance of exemptions abridges the constitutional provisions as to privileges and immunities of citizens."

To like effect see 16 American Jurisprudence 2d, Constitutional Law, Section 516, page 902.

Travis v. Yale & Towne Mfg. Co., 252 U. S. 60, 40 S. Ct. 228, 229, 64 L. Ed. 460 (1920), is the leading case on this subject.

In the *Travis* case, New York imposed an annual tax on both residents and nonresidents. Certain exemptions were given to resident taxpayers but in practical effect no exemption was given to nonresidents. The exemptions given to residents were $1,000 for a single person, $2,000 for a married person, and $200 for each additional dependent. The court said: "A nonresident taxpayer has no similar exemptions; * * *." The court found that this was a

case of inequality "operating to the disadvantage of all nonresidents including those who are citizens of neighboring states, and favoring all residents including those who are citizens of the taxing state." The court held that there accordingly had been a denial of the privileges and immunities guaranteed by the federal Constitution. Several dozen cases running up to the last year have cited *Travis* with approval, none with disapproval.

State v. Ashby, 387 P. 2d 588 (N. M. 1963), is squarely in point. In this case, action was brought by the state against a nonresident employee of a New Mexico military installation to require him to file a New Mexico state income tax return. The court held the New Mexico Income Tax Act unconstitutional in providing personal exemptions for residents but not providing the same exemptions for nonresidents. This was held to be a violation of the privileges and immunities clause of the federal Constitution and the equal protection clause of the Fourteenth Amendment.

The New Mexico Income Tax Act provided personal exemptions to residents of $1500 to unmarried persons, $2,500 to a husband and wife, plus $200 for each dependent minor child. There were no exemptions allowed to nonresidents.

The court discussed the *Travis* case, supra, and then stated:

> "We see no way to avoid a conclusion under the doctrine of the Travis case, relied on by appellant, that having imposed the tax upon 'every resident and non-resident' * * *, the failure to extend exemptions granted residents * * * to non-resident taxpayers brings the New Mexico act into conflict with art. IV, § 2, of the Constitution of the United States."

Also squarely in point is *State v. Berntsen,* 200 P. 2d

1007 (Ida. 1948). In the latter case Idaho brought action to recover income taxes from the defendants, husband and wife, who were residents of the state of Washington, though the defendant husband was employed in Idaho. The taxpayers acknowledged that they could be required to pay Idaho income tax even though they were nonresidents since the taxpayer husband was employed in Idaho. However, they contended that the Idaho income tax legislation was unconstitutional in that the law gave Idaho residents more exemptions against net income than were given to nonresidents.

The court held in favor of the taxpayers, that such discrimination violated the privileges and immunities clause of the federal Constitution. Under the Idaho income tax statute, Idaho residents were given a credit against net income of $1,500 in the case of a husband and wife and $200 for each dependent. Nonresidents in the same circumstances were given a credit of only $500.

The Idaho court so held in accordance with the *Travis* case, supra. It quoted at great length from the *Travis* case and concluded that "under the foregoing authorities, the statute as now written, insofar as it imposes a tax upon these non-resident defendants, is unconstitutional and void for violating Section 2, Article IV of the United States Constitution." (200 P. 2d 1010)

In *Borden v. Selden,* 146 N. W. 2d 306 (Iowa 1966), the Iowa legislature appropriated a state fund which was to be apportioned as a credit against taxes owing on agricultural lands but gave this credit only to residents of the state of Iowa. The court held, citing the *Travis* case as authority, that such was an unconstitutional discrimination against nonresidents. The court noted that the legislation "clearly distinguishes between owners of Iowa agricultural land solely on the basis of residence

and discriminates in favor of Iowa residents and against nonresidents." In holding the law unconstitutional, the court rejected the contention that it was proper to favor residents because of their "closer identity with the community and state." It also rejected the contention that residents participated more in the government of the state and *that they pay more sales taxes, even though, as in the instant case, the funds used to pay for the credit were claimed to come partly from sales tax.* The Iowa tax thus could, as here, have been called a "food sales tax credit."

The opinion added that the taxpayer in addition would be paying these or equivalent taxes to the state of his residence to help support the government of that state. "Denying him the land tax credit would not be tax equalization but in fact would burden him with a greater portion of the cost of the Iowa school system than his resident neighbor."

Finally, the court commented that though the "credit involved" was small, when converted into a percentage figure it meant that nonresident plaintiffs would pay from *ten* per cent to *eighteen* per cent more taxes than the residents situated similarly. The court said that *"This is a substantial difference."* 146 N. W. 2d at 314.

In *Burge v. Marcum,* 394 S. W. 2d 908 (Ky. 1965), the Kentucky court rejected the contention that it was proper to discriminate because nonresidents pay fewer taxes. The court held unconstitutional, under both the federal and state constitutions a state statute which provided that "All shares of stock in corporations organized under the laws of this state, belonging to a person whose domicile is in a country foreign to the United States or its possessions, shall, on the death of the owner, be subject to a tax of five percent. * * *" Cited as authority is the *Travis*

case. The court held that the tax unfairly discriminated against persons domiciled in a foreign country, that the latter may pay taxes in the foreign country, there thus being "double taxation."

In *Opinion of the Judges*, 140 N. W. 2d 34 (S. D. 1966), South Dakota had passed a "Property Tax Relief Act" under which certain funds were appropriated and placed in a Property Tax Relief Fund, to be returned to the taxing districts, to be used as a "credit" on the real and personal property taxes paid by residents of the state, though the credit was not available to nonresidents. The South Dakota Supreme Court held this tax credit to be in violation of the federal Constitution, citing as authority the *Travis* case. In so holding the court stated as follows at 140 N. W. 2d 35-6:

> "There is no reasonable basis for the discrimination contained in House Bill 707. It is based solely upon residence, and to the extent of credit or refund imposes a higher tax upon the citizens of other states than is imposed on our own. Consequently, we are compelled to advise you that the bill in question violates the quoted provisions of the Constitution of the United States and is, in our opinion, *clearly unconstitutional.*"

A long list of additional cases supporting appellants' contention will be cited if probable jurisdiction is noted here.

The opinion by the Nebraska Supreme Court in upholding the validity of the "food sales tax credit" acknowledges that as far as the Court can determine "this is a case of first impression" as to the validity of such credit. In upholding the validity of the food sales tax credit, the basis of the court's opinion is that "generally a state sales tax on food for personal use will be paid almost universally by residents of the state, while purchases of such food in the states by nonresidents are ordinarily minimal." This same

contention has been used in several of the above-cited cases in trying to uphold the validity of the discrimination involved in those cases. Such a contention could always be made where advantages are given to residents in tax statutes but denied to nonresidents—yet the decisions have unanimously stricken down such discrimination.

The Nebraska Supreme Court opinion also mentions "practical legislative and administrative reasons" for giving a food sales tax credit instead of exempting certain foods from sales tax. The opinion mentions the difficulty in defining foods and the difficulty to retailers collecting the tax in separately computing which items are subject to food tax and which are not. The court concludes that there is a valid classification between residents and nonresidents as to taxes on food sales.

However, granted that there are administrative problems to a retailer if food items were exempted from sales tax, the opinion fails completely to explain what administrative problems prevent *giving the credit to nonresidents* as well as residents. Nonresidents such as plaintiffs Etherington and Bray could be allowed to show on their state income tax returns by affidavit or otherwise the amount of sales tax they have paid on food purchases during the year so to the extent that they have paid a sales tax on food, they can claim a credit accordingly. Such should cause no more administrative problems than the large number of deductions which a taxpayer claims on his federal income tax return for state sales taxes he has paid and for charitable and church donations, medical expense, etc. etc. Many nonresidents will pay substantial Nebraska income tax from the mere fact that they are in the state to earn such income. Mere possible administrative problems in handling the food sales tax credit as to nonresidents does not justify such discrimination which arbitrarily allows this substan-

tial credit to residents and arbitrarily denies it to all nonresidents.

Finally, the Nebraska Supreme Court opinion states that the food sales tax credit is a "personal credit" as to which a state should be allowed to discriminate between residents and nonresidents. The New York case cited in the Nebraska Supreme Court opinion merely upheld the validity of a tax which allowed residents to deduct certain personal expenses but did not allow such deduction to nonresidents. This is the closest that any decision has gone toward allowing discrimination against nonresidents, but falls far short of the food sales tax credit here involved.

The food sales tax credit here involved is in its practical effect on the state tax owing no different than the exemptions allowed in the *Travis* case or in the New Mexico and Idaho income tax cases above cited where discriminatory exemptions were stricken down. Whether a dollar amount is applied as an exemption against income or a credit against tax, the end result is identical.

2. A state law which adopts future Federal laws constitutes an unlawful delegation of State legislative power to the Federal Congress, contrary to the Tenth and Fourteenth Amendments to the United States Constitution.

Decisions of the courts of the various states are practically unanimous in striking down state statutes which adopt future federal laws, holding them unconstitutional as delegating state legislative power to the federal government. Cases so holding include the following: *Smithberger v. Banning*, 129 Neb. 651, 262 N. W. 492 (1935) (public relief appropriations); *Crowly v. Thornbrough*, 294 S. W. 2d 62 (Ark. 1956) (state wage rates to be based on

federal wage rates); *Idaho Saving & Loan Association v. Roden,* 350 P. 2d 225 (Ia. 1960) (state savings and loan associations to conform with rules of federal Housing Act); *Seale v. McKennon,* 336 P. 2d 340 (Ore. 1959) (state adopting federal agricultural laws); *Dawson v. Hamilton,* 314 S. W. 2d 532 (Kent. 1958) (state uniform standards of time based on Federal standards); *State v. Urquhart,* 310 P. 2d 261 (Wash. 1957) (state medical license based on federal rules, etc.); *Dearborn Independent v. City of Dearborn,* 49 N. W. 2d 370 (Mich. 1951); *Florida Industrial Commission v. State,* 21 S. 2d 599 (Fla. 1945) (state unemployment compensation law making reference to federal social security act); *City of Cleveland v. Piskura,* 60 N. E. 2d 919 (Ohio 1945) (city ordinance basing ceiling prices on those fixed by Federal government); *Hutchins v. Mayo,* 197 So. 495 (Fla. 1940) (state fruit grading standards based on those fixed by federal Department of Agriculture); *Holgate Bros. Co. v. Bashore,* 200 Atl. 672 (Pa. 1938) (state statute prescribing maximum periods of labor based on federal regulations); *Brock v. Superior Court,* 71 P. 2d 209 (Cal. 1937); and *State v. Webber,* 133 A. 738 (Me. 1926) and *State v. Intoxicating Liquors,* 117 A. 588 (Me. 1922) (state liquor laws based on federal).

Following are decisions holding it unconstitutional for a state income tax law to adopt part or all of federal income tax legislation, including future changes: *Head v. McKenney,* 6 S. E. 2d 405 (Ga. 1939); *Featherstone v. Norman* (Ga. 1930), 153 S. E. 58; *Commonwealth v. Warner Bros. Theatres, Inc.* (Pa. 1942), 27 A. 2d 62; *Santee Mills v. Query,* 115 S. E. 202 (S. C. 1922).

The great majority of the above decisions merely hold that a state statute adopting future federal laws is "unconstitutional" without stating specifically whether there is a violation of the federal Constitution, state Constitution, or

both. Presumably these decisions find both Constitutions violated. There are no decisions by this Court as to whether a state statute which adopts future federal laws is a violation of the Constitution of the United States.

There is ample authority that a state law adopting a future federal law violates the federal Constitution. It is the position of the appellants here that the mere fact that the Constitution of the State of Nebraska has been amended to allow the state legislature to base its state income tax laws on future federal laws does not remove the federal constitutional objection, so that the Nebraska income tax legislation must be stricken down under the federal Constitution.

Nebraska's *Smithberger* case, supra, held that there is a violation both of the Nebraska Constitution and the Fourteenth Amendment to the federal Constitution in a Nebraska legislative act which adopted a future law of Congress.

Darweger v. Staats, 275 N. Y. S. 394 at 401 states that holding constitutional a state legislative act which adopts future federal legislation "seems contrary to the plain language and import of our *fundamental laws, both national and state.*" *Opinion of the Justices,* 239 Mass. 606, in holding unconstitutional a state statute adopting future federal laws states that "It would be destructive of fundamental conceptions of government through republican institutions for the representatives of the people to abdicate their exclusive privilege and obligation to enact laws."

Darweger v. Staats, supra, further states that a state statute attempting to delegate legislative authority to the federal government was not only in violation of the New York Constitution but was also "contrary to every principle upon which our republican institutions are based."

In *Knickerbocker Ice Co. v. Stewart,* 253 U. S. 149, 40 S. Ct. 438, 64 L. Ed. 834, there was before the Court a congressional act which allowed the workmen's compensation laws of the several states to apply to injuries within the federal admiralty and maritime jurisdiction. The Court held that this law was an unlawful delegation of *federal* congressional authority to the states and was accordingly unconstitutional. The Court said that:

> "We think the enactment is beyond the power of Congress. Its power to legislate concerning rights and liabilities within the maritime jurisdiction, and remedy for their enforcement, arises from the Constitution, as above indicated. * * * The subject was intrusted to it to be dealt with according to its discretion—not for delegation to others. * * * *Congress cannot transfer its legislative powers to the states—by nature this is non-delegable.*"

This is a reverse of the situation involved in the instant case. There can be neither delegation of legislative authority to the federal government, nor delegation by the federal government to the states.

In *Carter v. Carter Coal Co.,* 298 U. S. 238, 56 S. Ct. 855, this Court held unconstitutional the Bituminous Coal Conservation Act. At 298 U. S. 295, 56 S. Ct. 866 the Court discussed at length the sovereign powers of the states under the Tenth Amendment. The Court stated:

> "The determination of the Framers Convention and the ratifying conventions to preserve complete and unimpaired state self-government in all matters not committed to the general government is one of the plainest facts which emerges from the history of their deliberations. And *adherence to that determination is incumbent equally upon the federal government and the states. State powers can neither be appropriated on the one hand nor abdicated on the other.* As this court

> said in Texas v. White, 7 Wall. 700, 725, 19 L. Ed. 227, 'The *preservation of the States,* and the maintenance of their governments, *are as much within the design and care of the Constitution as the preservation of the Union* and the maintenance of the National government. * * *.'"

It is a well-recognized rule of law, cited in a multitude of cases, that there is a constitutional violation where a state legislature gives to a state administrative official legislative powers, this constituting an unlawful delegation of such powers. Such unlawful delegation is recognized to violate the state constitutions and also the Fourteenth Amendment to the Constitution of the United States. See 92 A. L. R. 400, 54 A. L. R. 1104, 12 A. L. R. 1435 and 42 Am. Jur., Public Administrative Law, Section 45, Page 342.

If there is a violation of the federal Constitution where a state statute delegates state legislative power to a *state* official, there would be a far more serious violation of the federal Constitution for a state to delegate its legislative power to a *different sovereign,* the United States government. Such constitutional objection cannot be removed simply by amending a state constitution.

The answer in the instant opinion of the Nebraska Supreme Court is to cite *Alaska Steamship Co. v. Mullaney,* 180 F. 2d 805 (C. A. 9, 1950), the sole modern case upholding the constitutionality of a law which adopts future federal income tax laws. However, the *Alaska Steamship Company* case is not in point since it involved a territorial income tax law of the Territory of Alaska, not a state law enacted by a sovereign state. Thus what that decision says in regard to a *federal territory* adopting the future federal income tax laws has little or no bearing on the federal constitutional question of whether a sovereign state

can lawfully delegate its legislaltive powers to the federal government.

3. The compact between the United States and the State of Nebraska at the time of its admission into the union required that it have a "republican" form of government. Such requirement is violated by the Nebraska Income Tax Law, which bases the State income tax paid on the Federal income tax laws of the future, thereby delegating State legislative authority to the Federal government, defined to be contrary to "republican" requirements. Such is further a violation of Article IV, Section 4 of the United States Constitution.

When Nebraska was admitted into the Union, the Enabling Act of Congress, which appears in Volume 2 of the Revised Statutes of Nebraska, Reissue of 1964, Page 5 stated in Section 4 thereof that as to one of the conditions for admitting Nebraska into the Union, that the Nebraska Constitution "when formed shall be republican, and not repugnant to the constitution of the United States and the principles of the Declaration of Independence."

Further proceedings as to the admission of Nebraska follow in the same volume of the Statutes and again state as a condition of admission that Nebraska be "republican" in its form of government.

Article IV, Section 4 of the Constitution of the United States provides that:

> "Section 4. The United States shall guarantee to every State in this Union a Republican Form of Government, * * *."

Opinion of the Justices, supra, struck down a state law which adopted future federal laws. The Massachusetts

court in speaking of "legislative power" states that "It is a power which cannot be surrendered or delegated or performed by any other agency. The enactment of laws is one of the high prerogatives of a sovereign power. It would be destructive of fundamental conceptions of government through *republican* institutions for the representatives of the people to abdicate their exclusive privilege and obligation to enact laws."

Darweger. v. Staats, 267 N. Y. 290, holds that a New York statute which adopts future federal laws is "contrary to every principle upon which our *republican* institutions are based."

The separation of federal and state powers is fundamental to our United States Constitution. The long list of state cases cited earlier shows the concern by our state courts that the states do not turn their sovereign powers over to the federal government.

In *Opinion of the Judges,* 140 N. W. 2d 34 (S. D. 1966), the court held unconstitutional a state taxation statute which discriminated against non-residents. In the course of this discussion the court noted that the South Dakota enabling act, by which South Dakota became a state, agreed that lands belonging to citizens of the United States residing in South Dakota "shall never be taxed at a higher rate than the lands belonging to residents thereof." The court held that "This provision was subsequently embodied in our Compact with the United States, now Article XXII of our Constitution. *It cannot be revoked without the consent of the United States.*"

The sole basis of the Nebraska Supreme Court opinion ruling against this contention is that there is no delegation of legislative power *since the Nebraska Legislature even*

after enacting the income tax law retains the power to repeal it. The opinion implies that as long as a state retains the power to change its laws there is no violation of the requirement of a "republican" (the opinion uses the term "representative") form of government.

Appellants respectfully submit that the opinion of the Nebraska Supreme Court not only fails to meet the argument of appellants, but further employs an argument impliedly rejected by the long list of cases cited in this Jurisdictional Statement. In these cases the courts have stricken down state statutes which adopt future federal legislation *even though in each instance the state retained the power to repeal the law which adopted the federal laws.* There is an unlawful delegation of state legislative power the moment a state enacts a law adopting future federal laws, regardless what happens thereafter.

THE QUESTIONS ARE IMPORTANT.

1. As for the food sales tax credit, if such provisions are allowed to stand, other states will doubtless follow. The food sales tax credit appears to be squarely contrary to the decision of this Court in the *Travis* case, supra, and in large number of cases in various jurisdictions which have followed the *Travis* case.

2. As for adopting future federal laws, the federal question involved is very substantial in view of the large and increasingly larger number of state statutes enacted which attempt to adopt federal laws. Two states in addition to Nebraska not only have enacted state income tax laws based on future federal income tax laws, but also have passed state constitutional amendments authorizing this to be done. These are New York (Article III, Section 22) and Colorado (Article X, Section 19).

3. As for the requirement of a "republican" form of government, it is a fundamental question of constitutional law as to how far the states are to be allowed to delegate their powers to the federal government, yet have a "republican" form of government.

CONCLUSION

Appellants respectfully submit that the Court should note probable jurisdiction.

RAY C. SIMMONS

214 Fremont National Bank Bldg.
Fremont, Nebraska

Attorney for Appellants

APPENDIX A

OPINION OF THE SUPREME COURT OF NEBRASKA

PHILIP C. ANDERSON ET AL., APPELLANTS, V. NORBERT TIEMANN ET AL., APPELLEES.

— N. W. 2d —

Filed December 22, 1967. No. 36810.

1. **Constitutional Law.** Each and every clause in a constitution has been inserted for some useful purpose.
2. **Constitutional Law, Construction of.** Constitutional provisions should receive even broader and more liberal construction than statutes. and constitutions are not subject to rules of strict construction.
3. **Statutes: Courts.** Where a statute is susceptible of two constructions, one of which renders it constitutional and the other unconstitutional, it is the duty of the court to adopt the construction which, without doing violence to the fair meaning of the statute, will render it valid.
4. **Constitutional Law: Taxation.** The constitutional amendment, Article VIII, section 1B, adopted by the electorate in November 1966, grants to the Nebraska Legislature the authority to enact income tax legislation which adopts by reference future income tax laws of the United States as they become effective; and the provisions of L.B. 377, of the 1967 Legislature, with reference thereto are valid.
5. **Statutes: Taxation.** The adoption of a state income tax based upon present and future federal income tax laws does not constitute a waiver of the sovereignty of the state nor an abdication of its functions nor constitute a violation of the requirements of a representative form of government.
6. **Administrative Law: Constitutional Law.** The rule-making authority granted to the Tax Commissioner by L.B. 377, of the 1967 Legislature, is a valid and lawful delegation of authority, and does not violate the Constitution of Nebraska nor of the United States.
7. ———: ———. L.B. 377, of the 1967 Legislature, constitutes a valid and lawful delegation of authority to the State Board of Equalization and Assessment and does not violate the Constitution of Nebraska nor of the United States.
8. ———: ———. L.B. 377, of the 1967 Legislature, does not unconstitutionally delegate judicial power to the Tax Commissioner.
9. **Constitutional Law: Taxation.** Article VIII, section 1, of the Constitution of Nebraska, does not prohibit a graduated state income tax.
10. ———: ———. A franchise tax based upon or measured by the

income of a corporation is not a property tax within the meaning of Article VIII, section 1, of the Constitution of Nebraska.

11. ———: ———. A tax classification, though discriminatory, is not arbitrary nor violative of the equal protection clause of the Fourteenth Amendment if any state of facts reasonably can be conceived that would sustain it.

12. Constitutional Law: Citizens. The privileges and immunities clause is not an absolute. It does bar discrimination against citizens of other states where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other states. But it does not preclude disparity of treatment in the many situations where there are perfectly valid independent reasons for it.

13. Constitutional Law: Taxation. The allowance and limitation of the food sales tax credit only to residents does not constitute unjust or unreasonable discrimination under the privileges and immunities and equal protection clauses of the Fourteenth Amendment.

14. Constitutional Law: Statutes. L.B. 377, of the 1967 Legislature, contains but one general subject, taxation, and does not violate Article III, section 14, of the Constitution of Nebraska, providing that no bill shall contain more than one subjeect.

15. Constitutional Law: Courts. This court will not decide questions of constitutionality unless they have been raised by a litigant whose interests are adversely affected. The courts will not set aside a law as violative of the Constitution for the reason that there is a possibility that one's interest may be injuriously affected in the future.

Appeal from the district court for Lancaster County: HERBERT A. RONIN, Judge. Affirmed.

Ray C. Simmons, for appellants.

Clarence A. H. Meyer, Attorney General, and Richard H. Williams, for appellees.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, SMITH, McCOWN, and NEWTON, JJ.

McCOWN, J.

The plaintiffs seek a declaratory judgment holding of L.B. 377, sections 14 through 137, enacted by the 1967 Legislature, unconstitutional and totally void insofar as it relates to the state income tax, and enjoining the defendants from enforcement. Plaintiffs include domestic corporations and both resident and nonresident individuals. Defendants are various officials of the State of

Nebraska. Issues were joined on a demurrer, stipulation of facts, and a later motion for summary judgment. The district court held that sections 14 to 137, L.B. 377, were valid in all respects, with one exception dealing with a portion of section 115 which was held invalid but severable, and dismissed the plaintiffs' petition.

L.B. 79 of the 1965 session of the Nebraska Legislature provided for the submission of a constitutional amendment on a state income tax to a vote of the people. That constitutional amendment was submitted to and approved by the electorate at the general election in November 1966. The amendment to Article VIII provides: "Sec. 1B. When an income tax is adopted by the Legislature, the Legislature may adopt an income tax law based upon the laws of the United States."

L.B. 377, designated as the "Nebraska Revenue Act of 1967," contains three general subdivisions. Sections 2 through 13 are designated (a) Sales and Use Tax; sections 14 through 124 are designated (b) Income Tax; and sections 125 through 137 are designated (c) General Provisions.

Section 14, the first section of the income tax subdivision, expressly provides in part: "Any term used in sections 14 to 124 of this act shall have the same meaning as when used in a comparable context in the laws of the United States relating to federal income taxes, unless a different meaning is clearly required. Any reference to the laws of the United States shall mean the provisions of the Internal Revenue Code of 1954, and amendments thereto, other provisions of the laws of the United States relating to federal income taxes, and the rules and regulations issued under such laws, *as the same may be or become effective, at any time or from time to time, for the taxable year.*" (Emphasis added.) Other sections of the act make similar references.

The plaintiffs' first contention is that those provisions of L.B. 377 which attempt to make future laws of the United States relating to the federal income tax

automatically effective as a part of the state income tax law are unconstitutional. Such action by the Nebraska Legislature is challenged as an unlawful delegation of legislative power to the United States in violation of Article II, section 1, Article III, section 1, of the Constitution of Nebraska.

It is conceded that the Nebraska Legislature may lawfully adopt by reference an existing law or regulation of another jurisdiction including the United States. Lincoln Dairy Co. v. Finigan, 170 Neb. 777, 104 N. W. 2d 227.

In 1935, this court held that a statute appropriating funds to be expended under the terms and conditions provided by an act of the Congress of the United States to be passed in the future, is an unconstitutional attempt on the part of the Legislature to delegate legislative authority to the Congress of the United States. Smithberger v. Banning, 129 Neb. 651, 262 N. W. 492. That case has not been overruled, and remains law in this jurisdiction, except as it may be affected by the constitutional amendment quoted above. The constitutional amendment having been adopted subsequent to the Smithberger case, necessitates an interpretation of the constitutional amendment and a determination as to whether that amendment granted the Legislature the authority, in adopting a state income tax law, to adopt future laws of the United States as they may be or become effective.

The plaintiffs' position is that the words "based upon" in the constitutional amendment connote only something already in existence or effect. The argument is that since the Legislature already possessed power to adopt existing laws of the United States by reference, nothing was changed by the constitutional amendment and, in effect, it was a useless gesture. We cannot agree.

The term "base" in Webster's Seventh New Collegiate Dictionary is defined as: "The point or line from which a start is made in an action or undertaking" or "The fundamental part of something." Webster's Twentieth Century Dictionary, unabridged (2d Ed.), contains among others, the definitions: "The foundation or most

important element, as of a system or set of ideas" and "Anything from which a start is made; basis."

The specific language of the amendment standing alone does not expressly state that future changes are to be included nor does it restrict the application to present laws only: Judicial interpretation is, therefore, required.

On the basis of the legislative history of L.B. 79 of the 1965 Legislature which submitted this amendment to the people, the trial court specifically found that: "* * * it was the intent of the legislature that power be given it by the Amendment to adopt the laws of the United States *with future changes*. The statements of two Senators support this and no statement is contained in the legislative history before the Court expressing a contrary intention."

This court has also recognized the principle of constitutional interpretation that each and every clause in a constitution has been inserted for some useful purpose. Constitutional provisions should receive even broader and more liberal construction than statutes, and constitutions are not subject to rules of strict construction. Carpenter v. State, 179 Neb. 628, 139 N. W. 2d 541.

In State ex rel. Meyer v. County of Lancaster, 173 Neb. 195, 113 N. W. 2d 63, this court stated: "Where a statute is susceptible of two constructions, one of which renders it constitutional and the other unconstitutional, it is the duty of the court to adopt the construction which, without doing violence to the fair meaning of the statute, will render it valid."

The cumulative effect of all these considerations is convincing. We think the clear purport and intent of the constitutional amendment was to grant the Legislature the authority to do exactly what it did. We hold that the constitutional amendment, Article VIII, section 1B, adopted by the electorate in November 1966, grants to the Nebraska Legislature the authority to enact income tax legislation which adopts by reference future income tax laws of the United States as they become effective and the provisions of L.B. 377 with reference thereto are valid.

The plaintiffs also contend that any such delegation of legislative authority to the United States violates the requirements of a representative form of government imposed by the enabling legislation admitting this state to the Union. By implication, the argument is that even though there was specific state constitutional authority, an adoption of future laws of the United States would still constitute an unconstitutional delegation of legislative authority. The additional implication is that such delegation implies an abdication or waiver of the sovereignty of the state and is, therefore, constitutionally prohibited.

Insofar as the briefs indicate, this is a case of first impression on the issue of whether a state can, by constitutional amendment and subsequent legislative action, adopt present and future income tax laws of the United States, and essentially make the claims for state income tax contingent upon, and correlative with, the establishment of liability for federal income tax. However, the general issue was considered by the 9th Circuit Court of Appeals in the case of Alaska Steamship Co. v. Mullaney, 12 Alaska 594, 180 F. 2d 805 (1950). Although Alaska was at that time a territory, under its organic act, it had the privilege of legislating, including the levying and collecting of taxes and revenue, in much the same manner as a state. The legislative design of basing the income tax on the federal income tax law as then in existence or thereafter amended, and calculating the state income tax as a percentage of the federal income tax was essentially the same. The court in that case stated: "We think it is far from clear that any invalid delegation is attempted. There are of course many cases which have held attempts by a legislative body to incorporate provisions into its enactments by reference to future acts or amendments by other legislatures, to be invalid. But where it can be said that the attempt to make the local law conform to future changes elsewhere is not a mere labor-saving device for the legislators, but is undertaken in order to attain a uniformity which is in itself an important object of the pro-

posed legislative scheme, there are a number of precedents for an approval of this sort of thing. * * * The effort of the Alaska legislature to make its territorial income tax machinery conform to the federal act, and to preserve and continue such conformity, makes sense. It makes for convenience to the taxpayer and for simplicity of administration. (Citing cases.) A similar coordination has been recommended by students of income tax problems for adoption by the states generally. Since the attainment of this uniformity was in itself a major objective of the Alaska legislature, in enacting that the local law must conform, the Alaska legislature, which alone could make this decision, was itself acting, and was not abdicating its functions, nor, in our opinion, making an invalid delegation to Congress."

Since Alaska became a state, its Supreme Court has approved the basic foundation of the Alaska act, "* * * which was to make the state's claim for income taxes contingent upon the establishment of liability for federal income taxes." The court also referred to "the prime objective of the Alaska statute which was aimed at convenience to the taxpayer and simplicity of administration." Hickel v. Stevenson (Alaska), 416 P. 2d 236 (1966).

The constitutional amendment with which we are dealing does not require, but only authorizes, the Legislature to base a state income tax law upon the laws of the United States. In connection with a state income tax law, we think it permits the Legislature to use all, part, or none of the laws of the United States as it may determine from time to time appropriate insofar as it may be lawful and practicable to do so. It does not preclude the Nebraska Legislature from repealing its own present enactment or adopting a completely different method of imposition of its income tax, and the Legislature retains the complete legislative power to make all such decisions. The adoption of a state income tax based upon present and future federal income tax laws does not constitute a waiver of the sovereignty of the state, nor an abdication of its functions, nor con-

stitute a violation of the requirements of a representative form of government.

The plaintiffs' next major issue involves the contention that L.B. 377 unconstitutionally delegates legislative authority and judicial powers to the Tax Commissioner. Section 119 of L.B. 377 provides in part: "(1) The Tax Commissioner shall administer and enforce the income tax imposed by this act and he is authorized to make such rules and regulations and to require such facts and information to be reported, as he may deem necessary to enforce the income tax provisions of this act; Provided, that such rules, regulations and reports shall not be inconsistent with the laws of this state or the laws of the United States."

The laws of the United States adopted by reference in L.B. 377 include the Internal Revenue Code, Regulations of the Internal Revenue Department, and court decisions interpreting them. See Estate of Willett v. Commissioner of Internal Revenue, 365 F. 2d 760 (5th Cir. 1966).

The dividing line between constitutional and unconstitutional delegation of legislative power under the decisions of many states, including our own, is difficult to determine exactly. For an extensive discussion of delegation of legislative power and a review of cases on the issue at both federal and state levels, see Louis L. Jaffe, An Essay on Delegation of Legislative Power, 47 Colum. L. Rev., part I at page 359 and part II at page 561.

This court has held: "The Legislature does have power to authorize an administrative or executive department to make rules and regulations to carry out an expressed legislative purpose, or for the complete operation and enforcement of a law within designated limitations. Such authority is administrative in its nature and its use by administrative officers is essential to the complete exercise of the powers of all departments." Lincoln Dairy Co. v. Finigan, *supra*. That case also reiterated the rule stated by this court in Board of Regents v. County of Lancaster, 154 Neb. 398, 48 N. W. 2d 221: "The exercise of a legislatively-delegated authority to

make rules to carry out an expressed legislative purpose, or for the complete operation and enforcement of a law with designated limitations is not an exclusive legislative power. It is administrative in its nature and its use by administrative agencies is usually essential to the complete and wise exercise of the power in the accomplishment of the purpose which the Legislature intended. Consuquently, the courts are not inclined to interfere with rules established by legislative direction where they bear a reasonable relation to the subject of the legislation and constitute a reasonable exercise of the powers conferred."

L.B. 377 imposes express limitations on the rule-making authority granted to the Tax Commissioner. The rules and regulations are restricted in character to those which are to enforce the income tax laws of this state and including by reference the laws of the United States relative thereto. The rules and regulations must also be consistent with both state and federal laws.

Delegation of legislative power is most commonly indicated where the relations to be regulated are highly technical or where regulation requires a course of continuous decision. The federal income tax structure comprises a comprehensive, cumulative, and currently functioning body of law in the income tax field. In the area of state income taxation, whether based on federal law or otherwise, it is quite apparent that the complicated and continuous task, if it is to be done at all, must be delegated. Where the Legislature has settled the guiding principles and standards of policy, and has provided the precision and due process which can obviously not be fully obtained in the basic legislation, the act should be upheld. The rule-making authority granted to the Tax Commissioner by L.B. 377 of the 1967 Legislature, is a valid and lawful delegation of authority, and does not violate the Constitution of Nebraska nor of the United States.

The plaintiffs' contentions with respect to unconstitutional delegation of legislative power extend also to the provisions of L.B. 377 which require the State Board

of Equalization and Assessment to set the rate of tax on or before November 15 of each year for the taxable year beginning during the subsequent calendar year. Section 15 of L.B. 377, in at least five subsections, explicitly sets out the computations to be made by the state board, the method and manner in which the computations shall be adjusted and determined, and the specific standards to be used in setting the rate of tax. The discussion as to delegation of legislative authority to the Tax Commissioner and the rules set out above also apply with respect to the delegation of authority to the State Board of Equalization and Assessment. L.B. 377 constitutes a valid and lawful delegation of authority to the State Board of Equalization and Assessment and does not violate the Constitution of Nebraska nor the United States.

Basically the same issues are involved with respect to delegation of judicial power. Article V, section 1, of the constitution, vests judicial power in the tribunals therein named but also gives to the Legislature the power to create other courts inferior to the Supreme Court. However, L.B. 377 does not create a court but does grant to a state official or administrative body quasi judicial powers. Powers of the same general nature and character are conferred upon many administrative bodies. Such duties are of a quasi judicial nature and yet such bodies are almost invariably held to be administrative. See Dawson County Irr. Co. v. McMullen, 120 Neb. 245, 231 N. W. 840. The conferring upon state agencies or officers, of executive or administrative functions requiring the exercise of quasi judicial powers, does not conflict with the constitutional provisions regarding officers and bodies upon whom judicial power may be conferred. This is particularly true where such powers and duties relate to matters which are peculiarly affected with a public interest and where provision is made for appeal from decisions of such officers or agencies to the courts. L.B. 377 does not unconstitutionally delegate judicial power to the Tax Commissioner.

The plaintiffs also contend that a state income tax

based upon the amount of federal income tax is a graduated tax because the federal tax is graduated, and, therefore, it is not levied uniformly and proportionately as required by the Constitution of Nebraska. It should only be necessary to point out that the same constitutional section, Article VIII, section 1, specifically provides that taxes other than property taxes may be authorized by law. The specific constitutional amendment dealing with the state income tax, even if interpreted as limiting the legislative authority to existing federal law, would permit a graduated income tax even if there were otherwise a question.

Plaintiffs also contend that the "franchise tax" is a property tax, is not levied by valuation uniformly and proportionately, and is invalid because of a 1966 constitutional amendment prohibiting the state from levying a property tax for state purposes. Section 34 (2) of L.B. 377 imposes a tax: "* * * for the privilege of exercising its franchise or doing business in this state in a corporate capacity * * * according to or measured by its entire net income derived from all sources within this state for the taxable year." Although referred to as a "franchise" tax, where such a tax is based upon or measured by the income of a corporation, it is almost universally held to be an excise tax or privilege tax and not a property tax within the meaning of similar constitutional provisions of other states. See Annotation, 71 A. L. R. 256. The constitutional objections raised by the plaintiffs as to validity on these issues cannot be sustained. L.B. 377 does not violate Article VIII, section 1, of the Constitution of Nebraska, requiring taxes to be levied by valuation uniformly and proportionately upon all tangible property and franchises, and prohibiting the state from levying a property tax for state purposes.

The plaintiffs likewise contend that the provisions of section 15 (3) of L.B. 377 which allow a "food sales tax credit" only to residents violates both the privileges and immunities clause and the equal protection clause of the Fourteenth Amendment. So far as we can determine,

this is a case of first impression in this country as to the validity of such a "food sales tax credit."

It is clear that the food sales tax credit, although set out in the income tax portion of the Nebraska Revenue Act of 1967, is actually a part of the sales tax rather than the income tax. Section 15 (3) provides that the food sales tax credit of $7 per qualified individual resident is not only allowed as a credit against the income tax payable, but is also allowed as a refund to the extent that the food sales tax credit exceeds the income tax payable by the resident individual for the taxable year. It also specifically provides that a resident individual, with excptions for individuals who are patients in or inmates of institutions exempt from the tax, shall be conclusively presumed to have paid "retail sales and use taxes imposed by this state equal to the maximum food sales tax credit allowable." It also provides for credits or refunds for "sales taxes" allowable by the subsection to be claimed on income tax returns, "or in the case of an individual not having tax liability in this state on such forms or claims for refunds as the Tax Commissioner shall prescribe."

The sales and use tax subdivision of L.B. 377, section 8 (2) (a), provides that if any sales or use tax amount has been paid more than once or been erroneously or illegally collected or computed, the excess amount collected or paid may be credited on any sales, use, or income tax amounts then due and payable from the person and any balance may be refunded.

The act itself establishes that the food sales tax credit is intended as a basic sales tax provision rather than an income tax provision.

While the legislative history of the amendment which added the food sales tax credit to L.B. 377 is not clear, a legislative policy is spelled out in the act to allow the credit or refund to be taken or claimed on the individual's state income tax return insofar as income tax returns may be required. For remaining cases, the refund is to be claimed on other forms. Sound administrative reasons would support this legislative policy decision. A

legislative determination to substitute the food sales tax credit in lieu of the exemption of certain foods from the provisions of the general state sales tax likewise seems evident. It is undisputed that the state could exempt or exclude foods or food products from the general sales tax if it so desired. The question remains whether the Legislature can constitutionally substitute a food sales tax credit and limit its application to residents.

It would seem reasonable for the Legislature to determine that generally a state sales tax on food for personal use will be paid almost universally by residents of the state, while purchases of such foods in the state by nonresidents are ordinarily minimal. It is also easy enough to see practical legislative and administrative reasons for the policy of a food sales tax credit in lieu of exempting certain foods from the operation of the general state sales tax. Under an ordinary or common exemption of specified or defined foods from a general sales tax, the Legislature and Tax Commissioner would have the problems of defining and describing the specific foods or food products which were to be exempted and which were not. Retailers charged with the collection of the tax would have the difficult task of separately computing and determining which food items were exempted and which were not. Merely the separate tabulation of taxable and nontaxable items would be a monumental task and additional expense for all concerned. The amount of tax involved would be minimal compared to the legislative, administrative, collection, and enforcement problems involved. For a discussion of such problems with sales and use taxes see, Pierce, Administration and Collection Problems, 9 Vanderbilt L. Rev. 281.

The power of a state to make reasonable and natural classifications for purposes of taxation is clear and unquestioned. "That a statute may discriminate in favor of a certain class does not render it arbitrary if the discrimination is founded upon a reasonable distinction, or difference in state policy. * * * Similarly, it has long

been settled that a classification, though discriminatory, is not arbitrary nor violative of the Equal Protection Clause of the Fourteenth Amendment if any state of facts reasonably can be conceived that would sustain it." Allied Stores of Ohio, Inc. v. Bowers, 358 U. S. 522, 79 S. Ct. 437, 3 L. Ed. 2d 480.

"Like many other constitutional provisions, the privileges and immunities clause is not an absolute. It does bar discrimination against citizens of other States where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other States. But it does not preclude disparity of treatment in the many situations where there are perfectly valid independent reasons for it. Thus the inquiry in each case must be concerned with whether such reasons do exist and whether the degree of discrimination bears a close relation to them." Toomer v. Witsell, 334 U. S. 385, 68 S. Ct. 1156, 92 L. Ed. 1460.

Cases cited by the plaintiffs in support of their position here are either property tax cases or income tax cases involving personal exemptions, all involving no discernible reasonable basis for discrimination except residence. No sales tax cases are cited by any of the parties. Viewed as a form of state sales tax exemption, the classification between residents and nonresidents as to the credit or refund of sales taxes on food for personal use is supported by valid independent reasons other than mere residence.

Even if it be assumed that the food sales tax credit is a part of the income tax rather than the sales tax, the result should be no different. A credit or deduction on income tax for sales taxes paid on food for personal use should logically be treated as a personal expense deduction, as opposed to a business expense deduction. Obviously, all Nebraska sales taxes, including those on food, are deductible when they are properly a part of a business expense deduction, or part of a deduction for expenses incurred in connection with property held for the production of income. Such business expense deductions are available to both residents and nonresidents.

A credit or deduction for sales taxes on food for personal use should, therefore, be classified as incurred in personal or nonincome producing activities. The allowance of such credits or deductions constitute an exception to the general principle that personal living expenses are not allowed as deductions for income tax purposes. In the case of such personal credits or deductions, the state may appropriately allow them to residents but exclude them from deductions allowed to nonresidents. Goodwin v. State Tax Commission, 146 N. Y. S. 2d 172, 286 App. Div. 694 (1955). The holding in the Goodwin case stems from Travis v. Yale & Towne Mfg. Co., 252 U. S. 60, 40 S. Ct. 228, 64 L. Ed. 460, and Shaffer v. Carter, 252 U. S. 37, 40 S. Ct. 221, 64 L. Ed. 445, both decided in 1920. The principle which supports such differentiation is the principle which limits both the taxable income and the deductible expenses of nonresidents to those connected with sources within the taxing state. The rule of the Goodwin case has also been adopted by other states since that time. See Berry v. State Tax Commission, 241 Or. 580, 397 P. 2d 780 (1964).

In our opinion, there are substantial reasons for the disparity of treatment between residents and nonresidents and the classification is not discriminatory nor arbitrary. Many facts support this classification, whether the credit, refund, or deduction be viewed from the aspect of a sales tax or an income tax. The Legislature may have been of the opinion that food purchases for personal use are so closely related to the state of residence, particularly with respect to the imposition of a state sales tax, that any exemption, credit, deduction, or refund should be allowed only by the state of residence and not by every other state in which some part of a taxpayer's income might be found and taxed. The wisdom of such a legislative policy is a matter for legislation rather than judicial decision. We hold that the allowance and limitation of the food sales tax credit only to residents does not constitute unjust or unreasonable discrimination under the privileges and immunities and equal protection clauses of the Fourteenth

Amendment.

Plaintiffs also contend that L.B. 377 provides for a sales tax, use tax, income tax, and a franchise tax, thereby violating Article III, section 14, of the Nebraska Constitution, which provides: "No bill shall contain more than one subject * * *." If an act has but one general object, no matter how broad that object may be, and contains no matter not germane thereto, and the title fairly expresses the subject of the bill, it does not violate Article III, section 14, of the Constitution. Rein v. Johnson, 149 Neb. 67, 30 N. W. 2d 548.

The various taxes provided for in L.B. 377, designated as the Nebraska Revenue Act of 1967, are closely related and germane to each other and are all to be administered by the Tax Commissioner. The various taxes are clearly stated in both the title as well as the body of the act and together comprise and constitute components of the tax structure of this state. This court holds that the provisions of L.B. 377 contain but one general subject, taxation, and that it does not violate the Constitution of Nebraska.

There are other constitutional objections raised by the plaintiffs in their briefs. Essentially, these objections do not go to the validity of the income tax as a whole, or do not present justiciable issues as to these plaintiffs. This court has repeatedly held that it will not decide questions of constitutionality unless they have been raised by a litigant whose interests are adversely affected. The courts will not set aside a law as violative of the Constitution for the reason that there is a possibility that one's interest may be injuriously affected in the future. Metropolitan Utilities Dist. v. Merritt Beach Co., 179 Neb. 783, 140 N. W. 2d 626.

The finding and judgment of the lower court that section 115 was partially invalid to the extent it purported to make a violation of regulations of the Tax Commissioner a misdemeanor, but holding the particular invalidity severable, was correct.

The memoradum opinion of the district court evidences a thorough and comprehensive consideration of

the issues involved. The judgment of the lower court was correct in all respects and is affirmed.

AFFIRMED.

APPENDIX B

Legislative Bill 377

INTRODUCED BY COMMITTEE ON REVENUE, UPON THE RECOMMENDATION OF THE GOVERNOR, J. W. BURBACH, 19TH DISTRICT, CHAIRMAN; ERIC RASMUSSEN, 32ND DISTRICT; MAURICE A. KREMER, 34TH DISTRICT; GEORGE H. FLEMING, 47TH DISTRICT; RICK BUDD, 2ND DISTRICT; TERRY CARPENTER, 48TH DISTRICT

AN ACT relating to taxation; to define terms; to impose a sales and use tax; to impose an income tax on individuals, trusts, estates, and certain corporations; to provide a corporate franchise tax; to provide for the tax rates; to provide for certain exemptions from such taxes; to define permitted accounting periods and methods; to provide methods for the apportionment of income; to permit reciprocity with other states; to provide for returns, declarations, and collection of tax; to provide withholding of wages; to incorporate by reference the federal income tax statutes, rules, and regulations; to provide for administration and enforcement; to provide penalties; to provide for the disposition of the revenue; to provide severability; and to declare an emergency.

Be it enacted by the people of the State of Nebraska,

Section 1. This act shall be known and may be cited as the Nebraska Revenue Act of 1967.

(a) Sales and Use Tax

Sec. 2. For the purpose of sections 2 to 13 of this act, unless the context otherwise requires:

(1) Business shall mean any activity engaged in by any person or caused to be engaged in by him with the object of gain, benefit or advantage, either direct or indirect;

(2) Tax Commissioner shall mean the Tax Commissioner of the State of Nebraska;

(3) Contractor or repairman shall mean any person who performs any repair services upon tangible personal property or who performs any improvement upon real estate, and who, as a necessary and incidental part of performing such services incorporates tangible personal property belong-

ing to him into the property being so repaired or improved. Contractor or repairman shall be considered to be the consumer of such tangible personal property furnished by him and incorporated into the property being so repaired or improved, for all of the purposes of this act;

(a) The above provision shall apply only if the contract between the person performing the services and the person receiving them does not separately state the price for the performance of the services and the furnishing of the necessary incidental material;

(b) If the contract between the person providing the services and the person receiving them contains separate amounts applicable to the performance of the services and the furnishing of the material, then the immediately foregoing subdivision shall not apply, and the person furnishing the materials shall be liable for the retail sales tax upon the agreed price of the materials as thus set forth in the contract; *Provided,* that the agreed price of the materials shall not be less than the actual cost of such materials to the person so providing them; and

(c) In any case where the person so providing such materials has paid the retail sales tax to his supplier when purchasing the tangible personal property, he shall be entitled to credit the tax so paid to his supplier against any tax imposed by this act with respect to his subsequent sale of that tangible personal property.

(4) (a) Gross receipts shall mean the total amount of the sale or lease or rental price, as the case may be, of the retail sales of the retailers, valued in money, whether received in money or otherwise, without any deduction on account of any of the following:

(i) The cost of tangible personal property sold. In accordance with such rules and regulations as the Tax Commissioner may prescribe, a deduction may be taken if the retailer has purchased tangible personal property for some purpose other than resale, has reimbursed his vendor for tax which the vendor is required to pay to the state or has paid the use tax with respect to the tangible personal prop-

erty, and has resold the property prior to making any use of the tangible personal property other than retention, demonstration, or display while holding it for sale in the regular course of business. If such a deduction is taken by the retailer, no refund or credit will be allowed to his vendor with respect to the sale of the tangible personal property;

(ii) The cost of the materials used, labor or service costs, interest paid, losses, or any other expense;

(iii) The cost of transportation of the tangible personal property prior to its sale to the purchaser; or

(iv) The amount of any excise or property tax levied against the tangible personal property, except as otherwise provided in this act.

(b) Gross receipts of every person engaged as a public utility shall mean:

(i) In the furnishing of telephone communication service, the gross income received from furnishing local exchange telephone service and intrastate message toll telephone service;

(ii) In the furnishing of telegraph service, the gross income received from the furnishing of such telegraph services; and

(iii) In the furnishing of gas, electricity, sewer, and water service except water used for irrigation of agricultural lands and manufacturing purposes, the gross income received from the furnishing of such services upon billings or statements rendered to consumers for such utility services.

Gross receipts shall not mean gross income received from the provision, installation, construction, servicing, or removal of tangible personal property used in connection with the furnishing of any such public utility services, or from telephone directory advertising.

(c) Gross receipts does not include any of the following:

(i) Cash discounts allowed and taken on sales;

(ii) Sales price of tangible personal property re-

turned by customers when the full sales price is refunded either in cash or credit;

(iii) The amount charged for labor or services rendered in installing or applying the tangible personal property sold; *Provided,* that said amount is separately stated, and such separate statement is not used as a means of avoiding imposition of this tax upon the actual sales price of the tangible personal property;

(iv) The amount charged for finance charges, carrying charges, services charges, or interest from credit extended on sales of tangible personal property under contracts providing for deferred payments of the purchase price; *Provided,* that such charges are not used as a means of avoiding imposition of the tax upon the actual sales price of the tangible personal property;

(v) The value of tangible personal property taken by a seller in trade as all or a part of the consideration for a sale of tangible personal property of any kind or nature;

(vi) Charges for transportation of tangible personal property after sale; or

(vii) For purposes of the sales or use tax, if the retailer established to the satisfaction of the Tax Commissioner, and has been given prior approval by the Tax Commissioner, that the sales or use tax has been added to the total amount of the sale price and has not been absorbed by him, the total amount of the sale price shall be deemed to be the amount received exclusive of the tax imposed.

(5) In this state or within the state shall mean within the exterior limits of the State of Nebraska, and includes all the territory within these limits owned by or ceded to the United States of America;

(6) Occasional sale shall mean a sale of tangible personal property by a person who is not engaged in the business of selling such property except motor vehicles as defined in section 60-301, Revised Statutes Supplement, 1965. Occasional sale shall include a sale whereby a person liquidates his business in a single transaction;

(7) Person shall mean and include any individual, firm, copartnership, joint venture, association, social club, fraternal organization, corporation, estate, trust, business trust, receiver, trustee, syndicate, cooperative, assignee, or any other group or combination acting as a unit, but shall also include the United States or any agency thereof, this state or any agency hereof, or any city, county, district, or other political subdivision of this state, or agency thereof;

(8) Purchase shall mean any transfer of title or possession, exchange, barter, lease or rental, conditional or otherwise, in any manner or by any means whatsoever, of tangible personal property for a consideration, including, but not limited to, a transfer of the possession of tangible personal property in which the seller retains the title as security for the payment of the price, and a transfer, for a consideration, of tangible personal property which has been produced, fabricated, or printed to the special order of the customer;

(9) Rental price or lease price shall mean the total amount for which tangible personal property is rented or leased, valued in money, whether paid in money or otherwise, without any deduction on account of (a) the cost of the tangible personal property rented or leased, (b) the cost of material used, labor or service cost, interest charged, losses, or any other expenses, or (c) the cost of transportion of tangible personal property at any time. The total amount for which tangible personal property is rented or leased includes any services which are a part of the lease or rental and any amount for which credit is given to the lessee or rentee by the lessor or rentor.

(10) Retail sale or sale at retail shall mean:

(a) A sale for any purpose other than for resale in the regular course of business of tangible personal property;

(b) The delivery in this state of tangible personal property by an owner or former owner thereof or by a factor or agent of such owner, former owner or factor, if the delivery is to a consumer or person for redelivery to a consumer, pursuant to a retail sale made by a retailer not engaged

in business in this state. The person making the delivery in such cases shall include the retail selling price of the tangible personal property in his gross receipts; and

(c) The sale of an admission ticket.

(11) Retail sale or sale at retail shall not include the sale of:

(a) Tangible personal property which will enter into and become an ingredient or component part of tangible personal property manufactured, processed or fabricated for untimate sale at retail;

(b) (i) Any form of animal life of a kind, the products of which ordinarily constitute food for human consumption. Animal life shall be defined in part, but not limited to, live poultry or livestock on the hoof when sales are made by the grower, producer, feeder, or by any person engaged in the business of bartering, buying or selling live poultry or livestock on the hoof;

(ii) Feed for any form of animal life of a kind the products of which ordinarily constitute food for human consumption;

(iii) Seeds and annual plants the products of which ordinarily constitute food for human consumption or are to be sold in the regular course of business; and

(iv) Agricultural chemicals to be applied to land or crops the products of which are to be used as food for human consumption or sold in the regular course of business;

(c) Nonreturnable containers when sold without the contents to persons who place the contents in the container and sell the contents together with the container; containers when sold with the contents if the sales price of the contents is not required to be included in the measure of the taxes imposed by this act; and returnable containers when sold with the contents in connection with a retail sale of the contents or when resold for refilling. The term returnable containers means containers of a kind customarily returned

by the buyer of the contents for reuse. All other containers are nonreturnable containers;

(d) Tangible personal property the transfer of which to the consumer constitutes an occasional sale or the transfer of which to the consumer is made by way of an occasional sale;

(e) Tangible personal property the sale, purchase or use of which has been taxed to that taxpayer in another state, territory, or possession of the United States of America; *Provided*, that such other state, territory or possession grants a reciprocal exclusion or an exemption to similar transactions in this state; or

(f) The purchase in this state or the purchase without this state, with title passing in this state, of materials and replacement parts, when used as, or when used directly in the repair and maintenance or manufacture of, motor vehicles, watercraft, railroad rolling stock, or aircraft engaged as common carriers of persons or property or the purchase in such manner of motor vehicles, watercraft, railroad rolling stock or aircraft to be used as common carriers of persons or property.

(12) Retailer shall mean:

(a) (i) Every seller engaged in the business of making sales of tangible personal property for storage, use, or other consumption or in the business of making sales at auction of tangible personal property owned by the person or others for storage, use, or other consumption;

(ii) Every person who leases or rents to another tangible personal property for storage, use or other consumption, except film rentals where an admission tax is charged under this act and railroad rolling stock interchanged pursuant to the provisions of the Interstate Commerce Act;

(iii) Every person engaged in the business of renting or furnishing for periods of less than thirty days any room or rooms, lodgings, or accommodations, in any hotel, motel, inn, tourist camp, tourist cabin, or any other place, except

a facility licensed under the provisions of Chapter 71, article 20, Reissue Revised Statutes of Nebraska, 1943, in which rooms, lodgings, or accommodations are regularly furnished for a consideration, shall be and constitute a retail merchant in respect thereto and the gross income received therefrom shall constitute gross income of a retail merchant received from transactions constituting selling at retail; and

(iv) Every person engaged as a public utility in furnishing telephone, telegraph, gas, electricity, sewer, and water service as defined in subdivision (4) (b) of this section; and

(b) When the Tax Commissioner determines that it is necessary for the efficient administration of this act to regard any salesmen, representatives, peddlers, canvassers or auctioneers and persons conducting auction sales as the agents of the dealers, distributors, supervisors, or employers under whom they operate or from whom they obtain the tangible personal property sold by them irrespective of whether they are making sales on their own behalf or on behalf of such dealers, distributors, supervisors, auctioneers or employers, the Tax Commissioner may so regard them and may regard the dealers, distributors, supervisors, auctioneers or employers as retailers for purposes of this act.

(13) Sale shall mean and include any transfer of title or possession or segregation in contemplation of transfer of title or possession, exchange, barter, lease, or rental, conditional or otherwise, in any manner or by any means whatsoever, of tangible personal property for a consideration. Sale shall include:

(a) The producing, fabricating, processing, printing or imprinting of tangible personal property for a consideration for consumers who furnish, either directly or indirectly, the materials used in the producing, fabricating, processing, printing, or imprinting;

(b) The furnishing and distributing of tangible personal property for a consideration by social clubs and fraternal organizations to their members or others;

(c) The furnishing, preparing, or serving for a consideration of food, meals, or drinks;

(d) A transaction whereby the possession of property is transferred but the seller retains the title as security for the payment of the price;

(e) A transfer for a consideration of the title or possession of tangible personal property which has been produced, fabricated, or printed to the special order of the customer; and

(f) The renting or furnishing for periods of less than thirty days of any room or rooms, lodgings, or accommodations in any hotel, motel, inn, tourist camp, tourist cabin, or any other place, except a facility licensed under the provisions of Chapter 71, article 20, Reissue Revised Statutes of Nebraska, 1943, in which rooms, lodgings, or accommodations are regularly furnished for a consideration.

(14) Sale for resale shall mean a sale of tangible personal property to any purchaser who is purchasing such tangible personal property for the purpose of reselling it in the normal course of his business, either in the form or condition in which it is purchased, or as an attachment to, or integral part of, other tangible personal property. A sale for resale shall include a sale of tangible personal property to a purchaser for the sole purpose of that purchaser's renting or leasing such tangible personal property to another person, but not if incidental to the renting or leasing of real estate;

(15) (a) Sales price shall mean the total amount for which tangible personal property is sold, valued in money, whether paid in money or otherwise, without any deduction on account of:

(i) The cost of the tangible personal property sold;

(ii) The cost of material used, labor or service cost, interest paid, losses, or any other expenses; or

(iii) The cost of transportation of the tangible personal property prior to its sale or purchase. The total amount for which tangible personal property is sold includes any services which are a part of the sale and any amount for which credit is given to the purchaser by the seller.

(b) Sales price does not include any of the following:

(i) Cash discounts allowed and taken on sales;

(ii) The amount charged for tangible personal property returned by customers when the entire amount charged therefor is refunded either in cash or credit;

(iii) The amount charged for labor or services rendered in installing and applying the property sold; *Provided*, that such amount is separately stated and such separate statement is not used as a means of avoiding imposition of the tax upon the actual sales price of the tangible personal property;

(iv) The amount charged for finance charges, carrying charges, services charges, or interest from credit extended on sales of tangible personal property under contracts providing for deferred payments of the purchase price; *Provided*, that such charges are not used as a means of avoiding imposition of the tax upon the actual sales price of the tangible personal property;

(v) The value of tangible personal property taken by a seller in trade as all or a part of the consideration for a sale of tangible personal property of any kind or nature; or

(vi) Charges for transportation of tangible personal property after sale.

(16) Seller shall include every person engaged in the business of selling, leasing, or renting tangible personal property of a kind the gross receipts from the retail sale, lease, or rental of which are required to be included in the measure of the sales tax;

(17) Storage shall include any retention in this state for any purposes except sale in the regular course of business or subsequent use solely outside this state of tangible personal property purchased from a retailer, other than tangible personal property which will enter into or become an ingredient or component part of tangible personal property manufactured, processed or fabricated for untimate sale at retail. Neither storage nor use as defined in this subdivision shall include the keeping, retaining, or exercising of any right or power over tangible personal property for the pur-

pose of subsequently transporting it outside the state, or for the purpose of being processed, fabricated, or manufactured into, attached to, or incorporated into, other tangible personal property to be transported outside the state and thereafter used solely outside the state;

(18) Tangible personal property shall mean personal property which may be seen, weighed, measured, felt or touched, or which is in any other manner perceptible to the senses;

(19) Taxpayer shall mean any person subject to a tax imposed by sections 2 to 13 of this act; and

(20) Use shall mean the exercise of any right or power over tangible personal property incident to the ownership or possession of that tangible personal property, except that it does not include the sale of that tangible personal property in the regular course of business or the exercise of any right or power over tangible personal property which will enter into or become an ingredient or component part of tangible personal property manufactured, processed or fabricated for ultimate sale at retail. Use specifically includes the incorporation of tangible personal property into real estate or into improvements upon real estate without regard to the fact that such real estate and improvements may subsequently be sold as such.

Sec. 3. (1) There is hereby imposed a tax of two and one half per cent upon the gross receipts from all sales of tangible personal property sold at retail in this state, the gross receipts of every person engaged as a public utility, and the gross receipts from the sale of admission tickets in this state on or after May 1, 1967, until January 1, 1969, and on and after such date the rate shall be two per cent.

(a) Except as to motor vehicles, the tax imposed by the provisions of this section shall be collected by the retailer from the consumer. It shall constitute a part of the purchase price and until collected shall be a debt from the consumer to the retailer and shall be recoverable at law in the same manner as other debts. The tax required to be col-

lected by the retailer from the consumer constitutes a debt owed by the retailer to this state;

(b) On credit, conditional, and installment sales the retailer may elect to pay the tax upon the collections made during each month or on the full amount of the sale. When the retailer has adopted one basis or the other of reporting credit, conditional, or installment sales and paying the tax thereon he will not be permitted to change from that basis without first having obtained the permission of the Tax Commissioner;

(c) It is unlawful for any retailer to advertise or to hold out or to state to the public or to any customer, directly or indirectly, that the tax or part thereof will be assumed or absorbed by the retailer or that it will not be added to the selling, renting, or leasing price of the property sold, rented, or leased, or that, if added, it or any part thereof will be refunded;

(d) The tax required to be collected by the retailer from the purchaser, unless otherwise provided by statute or by rule and regulation of the Tax Commissioner, shall be displayed separately from the list price, the price advertised in the premises, the marked price, or other price on the sales check or other proof of sales, rentals, or leases;

(e) For the purpose of more efficiently securing the payment, collection, and accounting for the sales tax, and for the convenience of the retailer in collecting the sales tax, it shall be the duty of the Tax Commissioner to formulate and promulgate appropriate rules and regulations prescribing a schedule or schedules of the amounts to be collected from the consumer or user to effectuate the computation and collection of the tax imposed by the provisions of this act. Such schedule or schedules shall provide that the tax shall be collected from the consumer or user uniformly on sales according to brackets based on sales prices of the item or items and shall provide that no tax be collected on sales below a sum of fifteen cents; *Provided,* that the Tax Commissioner may authorize computation and collection of the tax

uniformly on a straight percentage basis in lieu of brackets in situations involving machine or computer billing;

(f) The use of tokens or stamps for the purpose of collecting or of enforcing the collection of the taxes imposed in this act or for any other purpose in connection with such taxes is prohibited;

(g) For the purpose of the proper administration of the provisions of this act and to prevent evasion of the retail sales tax it shall be presumed that all gross receipts are subject to the tax until the contrary is established. The burden of proving that a sale of tangible personal property is not a sale at retail is upon the person who makes the sale unless he takes from the purchaser a resale certificate to the effect that the property is purchased for the purpose of reselling, leasing, or renting it or takes an exemption certificate pursuant to subsection (7) of section 5 of this act. Receipt of a resale certificate or exemption certificate shall be conclusive proof for the seller that the sale was made for resale;

(h) Whenever any retailer shall make delivery of any tangible personal property in this state after July 31, 1967, it shall be conclusively presumed that such property was sold at retail on or after May 1, 1967, unless the delivery thereof is made pursuant to a written contract entered into before May 1, 1967, with at least twenty-five per cent of the agreed price paid at the time such contract is entered into;

(i) In the rental or lease of automobiles, trucks, trailers, semitrailers, and truck-tractors as defined in section 60-301, Revised Statutes Supplement, 1965, for periods of thirty days or more, the lessor may elect not to collect and remit the sales tax on the gross receipts and instead pay a sales tax on the suggested manufacturer's retail delivered price at the time such vehicle is purchased. If such election is made, it shall be made pursuant to the following conditions:

(i) Notice of the desire to make such election shall be filed with the Tax Commissioner and shall not become effective until the Tax Commissioner is satisfied that the taxpayer has complied with all conditions of this subsection and all rules and regulations of the Tax Commissioner;

(ii) Such election when made shall continue in force and effect for a period of not less than two years and thereafter until such time as the lessor elects to terminate the election;

(iii) When such election is made, it shall apply to all vehicles of the lessor rented or leased for periods of thirty days or more. If the lessor rents or leases other vehicles for periods of less than thirty days, such lessor shall maintain his books and records and his accounting procedure as the Tax Commissioner shall prescribe; and

(iv) The Tax Commissioner by rule and regulation shall prescribe the contents and form of the notice of election, a procedure for the determination of the tax base of vehicles which are under an existing lease at the time such election becomes effective, the method and manner for terminating such election, and such other rules and regulations as may be necessary for the proper administration of this subdivision;

(j) If a sales or use tax has been paid on the purchase, storage, use or other consumption of tangible personal property used in the performance of a construction contract, which contract is for a fixed price and has been executed prior to May 1, 1967, and which tangible personal property is incorporated into the project and transferred to the owner of the structure constructed upon the completion of the contract, the person having paid such sales or use tax shall be entitled to a refund of the amount of taxes so paid. The Tax Commissioner shall by rule and regulation provide the manner and means of applying for such refund and shall require the furnishing of such proof as may reasonably be required to establish the fact that such property was used in the completion of a contract as defined in this subdivision and that any sales or use tax has in fact been paid on such tangible personal property; and

(k) The tax imposed by the provisions of this section on the sales of motor vehicles shall be the liability of the purchaser and the tax shall be collected by the county treasurer at the time the purchaser makes application for the

registration of the motor vehicle for operation upon the highways of this state. At the time of the sale of any motor vehicle, the seller shall (i) state on the sales invoice the dollar amount of the tax imposed hereunder, and (ii) furnish to the purchaser a certified statement of the transaction, in such form as the Tax Commissioner shall prescribe, setting forth as a minimum the total sales price, the allowance for any trade-in, and the difference between the two. The sales tax due shall be computed on the difference between the total sales price and the allowance for any trade-in as disclosed by such certified statement. A copy of such certified statement shall also be furnished to the Tax Commissioner. Any seller who fails or refuses to furnish such certified statement or who willfully falsifies any such statement shall be guilty of a misdemeanor and shall, upon conviction thereof, be punished by a fine of not less than twenty-five dollars nor more than one hundred dollars. If the seller fails to state on the sales invoice the dollar amount of the tax due, the purchaser shall have the right and authority to rescind any agreement for purchase and to declare the purchase null and void. If the purchaser retains such motor vehicle in this state and does not register it for operation on the highways of this state within twenty days of the purchase thereof, the tax imposed by the provisions of this section shall immediately thereafter be paid by the purchaser to the county treasurer. The county treasurer shall report and remit the tax so collected to the Tax Commissioner at such times as the Tax Commissioner may require by rule and regulation. The county treasurer shall deduct and withhold for the use of the county general fund the collection fee permitted to be deducted by any retailer collecting the sales tax; *Provided*, this collection fee shall be forfeited if the county treasurer violates any rule or regulation pertaining to the collection of the use tax.

(2) A use tax is hereby imposed on the storage, use, or other consumption in this state of tangible personal property purchased, leased or rented from any retailer on or after May 1, 1967, for storage, use, or other consumption in this state at the rate provided in subsection (1) of this section

on the sales price of the property or, in the case of leases or rentals, of said lease or rental prices.

(a) Every person storing, using, or otherwise consuming in this state tangible personal property purchased from a retailer or leased or rented from another person for such purpose is liable for the use tax. His liability is not extinguished until the use tax has been paid to this state, except that a receipt from a retailer maintaining a place of business in this state or from a retailer who is authorized by the Tax Commissioner, under such rules and regulations as he may prescribe, to collect the sales tax and who is, for the purposes of this act relating to the sales tax, regarded as a retailer maintaining a place of business in this state, given to the purchaser pursuant to subdivision (b) of this subsection is sufficient to relieve the purchaser from further liability for the tax to which the receipt refers.

(b) Every retailer maintaining a place of business in this state and selling, leasing, or renting tangible personal property for storage, use, or other comsumption in this state, shall, at the time of making any sale, collect any tax which may be due from the purchaser and shall give to the purchaser, upon request, a receipt therefor in the manner and form prescribed by the Tax Commissioner.

(c) The Tax Commissioner, in order to facilitate the proper administration of the use tax, may designate such person or persons as he may deem necessary to be use tax collectors and delegate to said persons such authority as is necessary to collect any use tax which is due and payable to the State of Nebraska. The Tax Commissioner shall require of all persons so designated a surety bond in favor of the State of Nebraska to insure against any misappropriation of state funds so collected. The Tax Commissioner may require any tax official, city, county, or state, to collect the use tax on behalf of the state. All persons designated to or required to collect the use tax shall account for such collections in the manner prescribed by the Tax Commissioner. Nothing in this subdivision shall be so construed as to prevent the Tax Commissioner or his employees from

collecting any use taxes due and payable to the State of Nebraska.

(d) All persons designated to collect the use tax and all persons required to collect the use tax shall forward the total of such collections to the Tax Commissioner at such time and in such manner as the Tax Commissioner may prescribe. Such collectors of the use tax shall deduct and withhold from the amount of taxes collected three per cent thereof as reimbursement for the cost of collecting the tax, but such deduction shall be forfeited to the State of Nebraska if such collector violates any rule, regulation, or directive of the Tax Commissioner.

(e) For the purpose of the proper administration of the provisions of this act and to prevent evasion of the use tax, it shall be presumed that tangible personal property sold, leased, or rented by any person for delivery in this state is sold, leased, or rented for storage, use or other consumption in this state until the contrary is established. The burden of proving the contrary is upon the person who purchases, leases, or rents the property.

(f) It shall be further presumed in the absence of evidence to the contrary, that tangible personal property shipped or brought to this state by the purchaser after May 1, 1967, was purchased from a retailer on or after that date for storage, use or other consumption in this state.

Sec. 4. (1) There are exempted from the computation of the amount of sales taxes imposed by this act the gross receipts from the sale, lease or rental of and the storage, use, or other consumption in this state of the following:

(a) Tangible personal property the gross receipts from the sale, lease, or rental of which, or the storage, use, or other consumption of which this state is prohibited from taxing under the Constitution or laws of the United States or under the Constitution of this state;

(b) (i) Aircraft fuel as defined under the provisions of Chapter 3, article 1, Reissue Revised Statutes of Nebraska, 1943, as amended;

(ii) Minerals, oil, and gas as defined under the provisions of Chapter 57, Reissue Revised Statutes of Nebraska, 1943, as amended; and

(iii) Motor vehicle fuels as defined, taxed or exempted under the provisions of Chapter 66, article 4, Reissue Revised Statutes of Nebraska, 1943, as amended, and special fuels as defined, taxed or exempted for use on the highways under the provisions of Chapter 66, article 6, Reissue Revised Statutes of Nebraska, 1943, as amended;

(c) Tangible personal property used for the performance of a written contract entered into prior to May 1, 1967, except as provided in subdivision (1) (h) of section 3 of this act;

(d) Any newspaper regularly issued at average intervals not exceeding one week; *Provided,* that such newspaper contains matters of general interest and reports of current events;

(e) Leased tangible personal property sold to a lessee of that tangible personal property under an agreement whereby certain rental payments are credited against the purchase price of that tangible personal property; *Provided,* that this exemption shall not exceed the amount for which the lessor has collected and paid tax on such rental payments;

(f) Prescription medicines when prescribed and dispensed for human use by a person licensed under the provisions of Chapter 71, article 1, Reissue Revised Statutes of Nebraska, 1943, and prosthetic devices;

(g) (i) Meals and food products, including soft drinks and candy, for human consumption served by public or private schools, school districts, student organizations, or parent-teacher associations pursuant to an agreement with the proper school authorities, in an elementary or secondary school or at any institution of higher education, public or private, during the regular school day or at an approved function of any such school or institution, but such exemption shall not apply to sales at any facility or function which is open to the general public, except that concession sales by elementary and secondary schools, public or private, shall be exempt;

(ii) Meals and food products, including soft drinks and candy, for human consumption when sold by a church at a function of such church; and

(iii) Meals and food products, including soft drinks and candy, for human consumption when served to patients and inmates of hospitals and other institutions licensed by the state for the care of human beings;

(h) Tangible personal property which is shipped to a point outside this state pursuant to the contract of sale by delivery by the retailer to such point by means of facilities operated by the retailer, delivery by the retailer to a carrier for shipment to a consignee at such point, delivery by the retailer to the United States post office for delivery outside this state, or delivery by the retailer to a customs broker or forwarding agent for shipment outside this state. This shall include the gross receipts from sales of tangible personal property to a common carrier, shipped by the seller via the purchasing carrier under a bill of lading, whether the freight is paid in advance or the shipment is made freight charges collect, to a point outside this state and the property is actually transported to the out-of-state destination for use by the carrier in the conduct of its business as a common carrier;

(i) The gross receipts from the sale, lease, or rental of any tangible personal property to, or the storage, use, or other consumption of tangible personal property by any organization created exclusively for religious purposes, any school, public or private, any institution established under the provisions of Chapter 14, 79, or 85, Reissue Revised Statutes of Nebraska, 1943, as amended, any private college or university, any licensed hospital, or any orphanage. Any person purchasing, storing, using, or otherwise consuming tangible personal property in the performance of any construction, improvement, or repair by or for any such institution organized not for profit, which tangible personal property is incorporated into a structure and becomes the property of the owner of the institution, shall pay any applicable sales or use tax thereon but shall be entitled to a refund of the

amount of taxes so paid. Such refund shall be made in the manner provided pursuant to subdivision (1) (j) of section 3 of this act;

(j) The gross receipts from the sale of tangible personal property when sold through coin operated vending machines below a sum of fifteen cents;

(k) Sales and purchases of electricity, coal, gas, fuel oil, diesel fuel, tractor fuel, propane, gasoline and oil, and coke for use in processing, manufacturing, mining, refining, irrigation, farming, building construction, telegraph, telephone and radio communication, street, and railroad transportation services and all business, commercial and industrial uses; and

(l) The use of coin operated machines used for laundering and cleaning.

(2) The storage, use, or other consumption in this state of tangible personal property, the gross receipts from the sale, lease, or rental of which are required to be included in the measure of the sales tax and on which the sales tax has been paid, is exempted from the use tax.

(3) The use tax imposed in this act shall not apply to:

(a) The use, in this state, of materials and replacement parts which are acquired outside this state and which are moved into this state for use directly in the repair and maintenance or manufacture of motor vehicles, watercraft, railroad rolling stock, or aircraft engaged as common carriers of persons or property; and

(b) The storage, use, or consumption of tangible personal property which is acquired outside this state, the sale, lease, or rental or the storage, use, or consumption of which property would be exempt from the sales or use tax were it purchased within this state.

(4) If any person, who causes tangible personal property to be brought into this state, has already paid a tax in another state in respect to the sale or use of such property in an amount less than the tax imposed by this section, the

provision of this section shall apply, but at a rate measured by the difference only between the rate herein fixed and the rate by which the previous tax on the sale or use was computed. If such tax imposed and paid in such other state is equal to or more than the tax imposed herein, then no use tax shall be due in this state on such personal property.

(5) A lease of tangible property from a subsidiary to the parent company shall not be subject to the sales and use tax imposed by this act. Such subsidiary company shall have the same sales and use tax liability on the purchase of property to be leased to the parent company as the parent company would have paid if the parent company had purchased the property directly.

Sec. 5. (1) Every retailer selling, leasing, or renting tangible personal property for storage, use, or other consumption in this state shall register with the Tax Commissioner and give:

(a) The name and address of all agents operating in this state;

(b) The location of all distribution or sales houses or offices or other places of business in this state; and

(c) Such other information as the Tax Commissioner may require.

(2) Every person furnishing public utility service as defined in subdivision (4) (b) of section 2 of this act shall register with the Tax Commissioner and give:

(a) The address of each office open to the public in which such public utility service business is transacted with consumers; and

(b) Such other information as the Tax Commissioner may require.

(3) It shall be unlawful for any person to engage in or transact business as a seller within this state after May 1, 1967, unless a permit or permits shall have been issued to him as hereinafter prescribed. Every person desiring to

engage in or to conduct business as a seller within this state shall file with the Tax Commissioner an application for a permit for each place of business. At the time of making such application, the applicant shall pay to the Tax Commissioner a permit fee of one dollar for each permit.

(4) Every application for a permit shall:

(a) Be made upon a form prescribed by the Tax Commissioner;

(b) Set forth the name under which the applicant transacts or intends to transact business and the location of his place or places of business;

(c) Set forth such other information as the Tax Commissioner may require; and

(d) Be signed by the owner if he is a natural person; in the case of an association or partnership, by a member or partner; in the case of a corporation, by an executive officer or some person authorized by the corporation to sign such kinds of applications.

(5) After compliance with the provisions of subsections (1) to (4) of this section by the applicant, the Tax Commissioner shall grant and issue to each applicant a separate permit for each place of business within the state. A permit shall not be assignable, and shall be valid only for the person in whose name it is issued and for the transaction of business at the place designated therein. It shall at all times be conspicuously displayed at the place for which issued and shall be valid and effective without further payment of fees until revoked by the Tax Commissioner.

(6) (a) Whenever the holder of a permit fails to comply with any provision of this act relating to the retail sales tax or with any rule or regulation of the Tax Commissioner relating to such tax prescribed and adopted under this act, the Tax Commissioner upon hearing, after giving the person twenty days' notice in writing specifying the time and place of hearing and requiring him to show cause why his permit or permits should not be revoked, may revoke or suspend

any one or more of the permits held by the person. The Tax Commissioner shall give to the person written notice of the suspension or revocation of any of his permits. The notices may be served personally or by mail in the manner prescribed for service of notice of a deficiency determination;

(b) The Tax Commissioner shall have the power to restore permits which have been revoked, but he shall not issue a new permit after the revocation of a permit unless he is satisfied that the former holder of the permit will comply with the provisions of this act relating to the retail sales tax and the regulations of the Tax Commissioner. A seller whose permit has been previously suspended or revoked shall pay the Tax Commissioner a fee of twenty-five dollars for the renewal or issuance of a permit in the event of a first revocation and fifty dollars for renewal after each successive revocation; and

(c) The action of the Tax Commissioner may be appealed by the taxpayer in the same manner as a final deficiency determination.

(7) For the purpose of more efficiently securing the payment, collection, and accounting for the sales and use taxes, and for the convenience of the retailer in collecting the sales tax, it shall be the duty of the Tax Commissioner to formulate and promulgate appropriate rules and regulations providing a form and method for the registration of exempt purchases and the documentation of exempt sales.

Sec. 6. (1) A resale certificate may be given by a purchaser who at the time of purchasing the tangible personal property, intends to sell, lease, or rent it in the regular course of business or is unable to ascertain at the time of purchase whether the tangible personal property will be resold, leased, or rented or will be used for some other purposes.

(2) The resale certificate shall be on such form and require the furnishing of such information as the Tax Commissioner may require by rule and regulation.

(3) If a purchaser who gives a resale certificate makes

any use of the property other than retention, demonstration, or display while holding it for sale, lease, or rental in the regular course of business, the use shall be taxable to the purchaser as of the time when the tangible personal property is first so used, and the sales price of the tangible personal property to him shall be deemed the measure of the tax.

(4) Any person who gives a resale certificate to the seller for tangible personal property which he knows, at the time of purchase, is purchased for the purpose of use rather than for the purpose of resale, lease, or rental by him in the regular course of business and each officer of any corporation which so gives a resale certificate shall be guilty of a misdemeanor.

(5) If a purchaser gives a resale certificate with respect to the purchase of tangible goods and thereafter commingles such goods with other tangible goods not so purchased but of such similarity that the identity of the constituent goods in the commingled mass cannot be determined, sales from the mass of commingled goods shall be deemed to be sales of the goods covered by the resale certificate until a quantity of commingled goods equal to the quantity of such goods so commingled has been sold.

(6) Any person, firm, or corporation engaged in multi-state operations and engaged as a common carrier of persons or property may apply to the Tax Commissioner for an exemption certificate which will permit such person or corporation to make purchases of any nature within this state or without this state and bring such purchases into this state for use both within and without this state, for storage in this state, and *when withdrawn from storage* to be used within or without the state without paying the sales or use tax thereon, until such articles, materials, or supplies or finished products are placed in use within this state. When such articles, materials, supplies, or finished products are used within this state a person to whom such exemption certificate has been issued shall, on the last day of the first following month after which such articles, materials, supplies, or finished products are put to use within this state, make a report to the Tax Commissioner

as to the amount of use or sales tax, if any, which is due the state and make the payments to the state at the time of making the return. If the Tax Commissioner, after investigation, finds that the applicant maintains satisfactory books of account and that granting such exemption would not result in the evasion or avoidance of any tax otherwise properly due, he shall issue such exemption certificate. Any person granted such an exemption certificate shall furnish a copy thereof to any vendor from whom purchases are made and such vendor may deliver any such purchases to the holder of any such certificate without collection of any such sales tax.

(7) (a) Goods, wares, and merchandise stored in transit in this state in bonded and licensed warehouses or storage areas, whether manufactured, processed, produced, or otherwise originating within or without this state and which are intended for and which are shipped to final destinations outside this state upon leaving such warehouses or storage areas shall be exempt from sales and use tax while in such warehouses or storage areas.

(b) Bonded and licensed warehousemen or those maintaining the prescribed storage areas shall be licensed as retailers and required to collect the required sales or use tax on any goods so stored which are intended for shipment to final destinations outside this state upon leaving such warehouses or storage areas but which are in fact delivered to final destinations in this state upon leaving such warehouses or storage areas.

(c) Bonded and licensed warehouses or storage areas as used in this act shall mean those who have complied with the provisions of section 77-1226.02, Reissue Revised Statutes of Nebraska, 1943; *Provided,* that the bond required in such section shall also be made conditional upon compliance with the provisions of this subsection.

Sec. 7. (1) If any person liable for any sales or use tax under the provisions of this act sells out his business or stock of goods or quits the business, his successor or assigns shall withhold sufficient of the purchase price to cover such amount until the former owner produces a receipt from the Tax Com-

missioner showing that it has been paid or a certificate stating that no amount is due.

(2) If the purchaser of a business or stock of goods fails to withhold a portion of the purchase price as required, he shall become personally liable for the payment of the amount required to be withheld by him to the extent of the purchase price, valued in money. Within sixty days after receiving a written request from the purchaser for a certificate, or within sixty days from the date the former owner's records are made available for audit, whichever period expires the later, the Tax Commissioner shall either issue the certificate or mail notice to the purchaser at his address as it appears on the records of the Tax Commissioner of the amount that must be paid as a condition of issuing the certificate. Failure of the Tax Commissioner to mail the notice shall release the purchaser from any further obligation to withhold a portion of the purchase price as provided in this subsection. The time within which the obligation of the successor may be enforced shall start to run at the time the former owner sells out his business or stock of goods or at the time that the determination against the former owner becomes final, whichever event occurs the later.

Sec. 8. (1) (a) The sales and use taxes imposed by the provisions of this act shall be due and payable to the Tax Commissioner monthly on or before the last day of the month next succeeding each monthly period, unless otherwise provided pursuant to the provisions of this act.

(b) (i) On or before the last day of the month following each monthly period or such other period as the Tax Commissioner may require, a return for such period, along with all taxes due, shall be filed with the Tax Commissioner in such form and content as the Tax Commissioner may prescribe, and containing such information as the Tax Commissioner deems necessary for the proper administration of the provisions of this act; *Provided*, the Tax Commissioner, if he deems it necessary in order to insure payment to or facilitate the collection by the state of the amount of sales or use taxes due, may require returns and payment of the amount of such

taxes for periods other than monthly periods, in the case of a particular seller, retailer, or purchaser, as the case may be; *and provided further,* the Tax Commissioner may by rule and regulation permit or require quarterly or semiannual reports and tax payments from sellers, retailers, or purchasers as the case may be who have small tax liabilities;

(ii) For purposes of the sales tax a return shall be filed by every retailer liable for collection from a purchaser and payment to the state of the tax. For purposes of the use tax a return shall be filed by every retailer maintaining a place of business in the state and by every person who has purchased tangible personal property, the storage, use, or other consumption of which is subject to the use tax, but who has not paid the use tax due to a retailer required to collect the tax;

(iii) Returns shall be signed by the person required to file the return or by his duly authorized agent but need not be verified by oath; and

(iv) A taxpayer who keeps his regular books and records on a cash basis or on an accrual basis or on any generally recognized accounting basis which correctly reflects the operation of the business, may file the sales and use tax returns required by this act on the same accounting basis that is used for the regular books and records.

(c) The taxpayer required to file the return shall deliver or mail any required return together with a remittance of the net amount of the tax due to the office of the Tax Commissioner on or before the required filing date. Failure to file the return, filing after the required filing date, failure to remit the net amount of the tax due, or remitting the net amount of the tax due after the required filing date shall be cause for a penalty of forfeiture of the collection fee allowed pursuant to subdivision (d) of this subsection or twenty-five dollars, whichever is greater.

(d) The taxpayer shall deduct and withhold, from the taxes otherwise due from him on his monthly tax return, three per cent thereof to reimburse himself for the cost of collecting the tax.

(2) (a) If the Tax Commissioner determines that any sales or use tax amount, penalty, or interest has been paid more than once, or has been erroneously or illegally collected or computed, the Tax Commissioner shall set forth that fact in his records and the excess amount collected or paid may be credited on any sales, use or income tax amounts then due and payable from the person under the provisions of this act. Any balance may be refunded to the person by whom it was paid, or his successors, administrators, or executors.

(b) No refund shall be allowed unless a claim therefor is filed with the Tax Commissioner by the person who overpaid the tax or his attorney, assignee, executor, or administrator, within three years from the last day of the month following the close of the period for which the overpayment was made, or within six months after any determination becomes final under the provisions of section 9 of this act, or within six months from the date of overpayment with respect to such determinations, whichever of these three periods expires the later unless the credit relates to a period for which a waiver has been given. Failure to file a claim within the time prescribed in this subsection shall constitute a waiver of any demand against the state on account of overpayment.

(c) Every claim shall be in writing and shall state the specific grounds upon which the claim is founded.

(d) The Tax Commissioner shall allow or disallow a claim within ninety days after it has been filed. If the Tax Commissioner has neither allowed nor disallowed a claim within such ninety days, the claim shall be deemed to have been allowed.

(e) Within thirty days after disallowing any claim in whole or in part, the Tax Commissioner shall serve notice of his action on the claimant in the manner prescribed for service of notice of a deficiency determination.

(f) Within ninety days after the mailing of the notice of the Tax Commissioner's action upon a claim filed pursuant to the provisions of this act, the action of the Tax Commissioner shall be final unless the taxpayer seeks review of the Tax

Commissioner's determination as hereinafter provided in section 126 of this act.

(g) Upon the allowance of a credit or refund, of any sum erroneously or illegally assessed or collected, or of any penalty collected without authority, or of any sum which was excessive or in any manner wrongfully collected, interest shall be allowed and paid on the amount of such credit or refund at the rate of six per cent per annum from the date such sum was paid or from the date the return was required to be filed, whichever date is later, to the date of the allowance of the refund, or in the case of a credit, to the due date of the amount against which the credit is allowed, but in the case of a voluntary and unrequested payment in excess of actual tax liability, no interest shall be allowed when such excess is refunded or credited.

(h) No suit or proceeding shall be maintained in any court for the recovery of any amount alleged to have been erroneously or illegally determined or collected unless a claim for refund or credit has been duly filed.

(i) The Tax Commissioner may recover any refund or part thereof which is erroneously made and any credit or part thereof which is erroneously allowed in an action brought, within one year from the date of refund or credit, in the name of the state, in a court of competent jurisdiction in the county in which the taxpayer involved is located.

(j) The action shall be tried in the county in which the taxpayer involved is a resident unless the court orders a change of place of trial.

(k) The Attorney General shall prosecute the action provided for in subdivision (j) of this subsection, and the provisions of state law and the rules of civil procedure relating to service of summons, pleadings, proofs, trials, and appeals shall be applicable to the proceedings.

(l) Credit shall be allowed to the retailer, contractor or repairman for sales or use taxes paid pursuant to this act on (i) sales represented by that portion of an account determined to be worthless and actually charged off for federal income

tax purposes; *Provided*, that if such accounts are thereafter collected by the retailer, contractor or repairman, a tax shall be paid upon the amount so collected; or (ii) on the portion of the purchase price remaining unpaid at the time of a repossession made under the terms of a conditional sales contract.

Sec. 9. (1) If the Tax Commissioner is not satisfied with the return or returns of the tax or the amount of tax required to be paid to the state by any person, he may compute and determine the amount required to be paid upon the basis of the facts contained in the return or returns or upon the basis of any information within his possession or which may come into his possession. In making a determination, the Tax Commissioner may offset overpayments for a period or periods, together with interest on the overpayments, against underpayments for other period or periods, against penalties, and against the interest on the underpayments.

The interest on underpayments and overpayments shall be computed in the manner set forth hereinafter.

(2) If any person fails to make a return, the Tax Commissioner shall make an estimate of the amount of the gross receipts of the person, or, as the case may be, of the amount of the total sales, rent, or lease price of tangible personal property sold, rented, or leased or purchased, by the person, the storage, use, or consumption of which in this state is subject to the use tax. The estimate shall be made for the period or periods in respect to which the person failed to make a return and shall be based upon any information which is in the Tax Commissioner's possession or may come into his possession. Upon the basis of this estimate, the Tax Commissioner shall compute and determine the amount required to be paid to the state, adding to the sum thus arrived at a penalty equal to ten per cent thereof or twenty-five dollars, whichever is greater. One or more determinations may be made for one or more than one period.

(3) The amount of the determination of any deficiency exclusive of penalties shall bear interest at the rate of one

half of one per cent per month, or fraction thereof, from the last day of the month following the period for which the amount should have been returned until the date of payment.

(4) If any part of a deficiency for which a deficiency determination is made is the result of fraud or an intent to evade this act or authorized rules and regulations, a penalty of twenty-five per cent of the amount of the determination or fifty dollars, whichever is greater, shall be added thereto.

(5) (a) Promptly after making his determination, the Tax Commissioner shall give to the person written notice of his determination;

(b) The notice may be served personally or by mail, and if by mail the notice shall be addressed to the person at his address as it appears in the records of the Tax Commissioner. In case of service by mail of any notice required by the provisions of this act, the service is complete at the time of deposit in the United States post office; and

(c) Every notice of a deficiency determination shall be personally served or mailed within three years after the last day of the calendar month following the period for which the amount is proposed to be determined or within three years after the return is filed, whichever period expires the later. In the case of failure to make a return, every notice of determination shall be mailed or personally served within five years after the last day of the calendar month following the period for which the amount is proposed to be determined.

(6) When a business is discontinued, a determination may be made at any time thereafter within the periods specified herein as to liability arising out of that business, irrespective of whether the determination is issued prior to the due date of the liability as otherwise specified in this act.

(7) Any person against whom a determination is made under subsections (1) and (2) of this section or under section 10 of this act, or any person directly interested, may petition for a redetermination within thirty days after service upon the person of notice thereof. If a petition for redetermination

is not filed within the thirty-day period, the determination becomes final at the expiration of the period.

(8) If a petition for redetermination is filed within the thirty-day period, the Tax Commissioner shall reconsider the determination and if the person has so requested in his petition, shall grant the person an oral hearing and shall give him ten days' notice of the time and place of the hearing. The Tax Commissioner may continue the hearing from time to time as may be necessary.

(9) The Tax Commissioner may decrease or increase the amount of the determination before it becomes final, but the amount may be increased only if a claim for the increase is asserted by the Tax Commissioner at or before the hearing, upon which assertion the petitioner shall be entitled to a thirty-day continuance of the hearing to allow him to obtain and produce further evidence applicable to the items upon which the increase is based.

(10) The order or decision of the Tax Commissioner upon a petition for redetermination shall become final thirty days after service upon the petitioner of notice thereof.

(11) All determinations made by the Tax Commissioner under the provisions of section 10 of this act are due and payable twenty days after the time they become final. If they are not paid when due and payable, a penalty of ten per cent of the amount of the determination, exclusive of interest and penalties, shall be added thereto.

(12) Any notice required by subsections (7) and (11) of this section shall be served personally or by mail in the manner prescribed in subsection (5) of this section.

Sec. 10. (1) If the Tax Commissioner finds that a taxpayer is about to depart from the State of Nebraska, remove his property therefrom, conceal himself or his property therein, or do any other act tending to delay, prejudice or render wholly or partially ineffectual any proceedings to collect the sales or use tax for the preceding or current taxable year unless such proceedings be brought without delay, the Tax

Commissioner shall declare the taxable period for such taxpayer immediately terminated, and shall cause notice of such findings and declaration to be given the taxpayer, together with a demand for immediate payment of any such tax due for this period, whether or not the time otherwise allowed by law for filing returns and paying such tax has expired. Such tax shall thereupon become immediately due and payable. In any proceedings in court brought to enforce payment of taxes made due and payable by virtue of the provisions of this section, such findings of the Tax Commissioner, whether made after notice to the taxpayer or not, shall be for all purposes prima facie evidence of the taxpayer's design.

(2) The person against whom a jeopardy determination is made may petition for the redetermination thereof pursuant to the provisions of section 9 of this act. He shall file the petition for redetermination with the Tax Commissioner within ten days after the service upon him of notice of determination or the determination shall become final at the expiration of the ten-day period and the Tax Commissioner shall not reconsider the determination. The person shall also within the ten-day period deposit with the Tax Commissioner such security as the Tax Commissioner may deem necessary to insure compliance with the provisions of this act. The security may, if necessary, be sold by the Tax Commissioner in the manner prescribed by the provisions of section 131 of this act.

(3) A taxpayer who is not in default in making any return or paying any sales or use taxes assessed under the provisions of this act may furnish to the Tax Commissioner, under regulations to be prescribed by the Tax Commissioner, security that he will duly make the return next thereafter required to be filed and pay such tax next thereafter required to be paid. The Tax Commissioner may approve and accept in like manner security for return and payment of sales or use taxes made due and payable by virtue of the provisions of this section.

(4) If security is approved and accepted and such further or other security with respect to the tax or taxes covered thereby is given as the Tax Commissioner shall from time to

time find necessary and require payment of such taxes shall not be enforced by any proceedings under the provisions of this section prior to the expiration of the time otherwise allowed for paying such taxes.

(5) In the case of a bona fide resident of Nebraska about to depart from the state the Tax Commissioner may waive any or all of the requirements placed upon the taxpayer by the provisions of this section.

(6) If a taxpayer violates or attempts to violate any provision of this section there shall, in addition to all other penalties, be added as part of the tax twenty-five per cent of the total amount due or fifty dollars, whichever is greater.

(7) If the taxpayer is not within this state, or has departed from the state and ignores all demands for payment the Tax Commissioner may employ the services of any qualified collection agency or attorney and pay fees for such services out of any money recovered.

Sec. 11. (1) (a) The Tax Commissioner shall enforce the provisions of sections 2 to 13 of this act and may prescribe, adopt, and enforce rules and regulations relating to the administration and enforcement of such sections of this act.

(b) The Tax Commissioner may prescribe the extent to which any ruling or regulation shall be applied without retroactive effect.

(2) The Tax Commissioner may employ accountants, auditors, investigators, assistants, and clerks necessary for the efficient administration of this act, and may delegate authority to his representatives to conduct hearings, prescribe regulations, or perform any other duties imposed by sections 2 to 13 of this act.

(3) (a) Every seller, every retailer, and every person storing, using, or otherwise consuming in this state tangible personal property purchased from a retailer shall keep such records, receipts, invoices, and other pertinent papers in such form as the Tax Commissioner may reasonably require.

(b) Every such seller, retailer, or person shall keep such records for not less than two years from the making of such records unless the Tax Commissioner in writing sooner authorized their destruction.

(4) The Tax Commissioner or any person authorized in writing by him may examine the books, papers, records, and equipment of any person selling tangible personal property and any person liable for the use tax and may investigate the character of the business of the person in order to verify the accuracy of any return made, or, if no return is made by the person, to ascertain and determine the amount required to be paid.

(5) The taxpayer shall have the right to keep or store his records at a point outside this state and shall make his records available to the Tax Commissioner at all times.

(6) In administration of the use tax, the Tax Commissioner may require the filing of reports by any person or class of persons having in his or their possession or custody information relating to sales of tangible personal property, the storage, use, or other consumption of which is subject to the tax. The report shall be filed when the Tax Commissioner requires, and shall set forth the names and addresses of purchasers of the tangible personal property, the sales price of the property, the date of sale, and such other information as the Tax Commissioner may require.

(7) It shall be a misdemeanor for the Tax Commissioner or any official or employee of the Tax Commissioner to make known in any manner whatever the business affairs, operations, or information obtained by an investigation of records and activities of any retailer or any other person visited or examined in the discharge of official duty, or the amount or source of income, profits, losses, expenditures, or any particular thereof, set forth or disclosed in any return, or to permit any return or copy thereof, or any book containing any abstract or particulars thereof to be seen or examined by any person not connected with the Tax Commissioner. Nothing in this section shall be construed (a) to prohibit the delivery to a taxpayer, his duly authorized representative, or his suc-

cessors, receivers, trustees, executors, administrators, assignees, or guarantors, if directly interested, of a certified copy of any return or report in connection with his tax, (b) to prohibit the publication of statistics so classified as to prevent the identification of particular reports or returns and the items thereof, (c) the inspection by the Attorney General or other legal representative of the state of the report or return of any taxpayer who shall bring an action to review the tax based thereon, or against whom an action or proceeding for collection of tax has been instituted, or (d) to prohibit the furnishing of any information to the United States government or to states allowing similar privileges to the Tax Commissioner.

(8) In all proceedings under the provisions of this act, the Tax Commissioner may act for and on behalf of the people of the State of Nebraska. The commissioner in his discretion may waive all or part of any penalties provided by the provisions of this act, but may not waive the minimum interest on delinquent taxes of one half of one per cent per month.

Sec. 12. (1) (a) If any person is delinquent in the payment of the sales and use tax required under the provisions of this act to be paid by him or in the event a determination has been made against him which remains unpaid, the Tax Commissioner may, not later than three years after the payment became delinquent or within three years after the last recording of a certificate under subsection (2) of this section, give notice thereof personally or by registered or certified mail to all persons, including any officer or department of the state or any political subdivision or agency of the state, having in their possession or under their control any credits or other personal property belonging to the delinquent, or owing any debts to the delinquent or person against whom a determination has been made which remains unpaid, or owing any debts to the delinquent or such person.

(b) After receiving the notice provided for in subdivision (1) (a) of this section, the persons so notified shall neither transfer nor make any other disposition of the credits, other personal property, or debts in their possession or under their control at the time they received the notice until the Tax

Commissioner consents to a transfer or disposition, or until sixty days elapse after the receipt of the notice, whichever period expires earlier.

(c) All persons so notified shall, within twenty days after receipt of the notice, report in writing to the Tax Commissioner all such credits, other personal property, or debts in their possession, under their control, or owing by them.

(d) If such notice seeks to prevent the transfer or other disposition of a deposit in a bank or other credits or personal property in the possession or under the control of a bank, the notice, in order to be effective, shall be delivered or mailed to the office of such bank at which such deposit is carried or at which such credits or personal property is held.

(e) If, during the effective period of the notice to withhold, any person so notified makes any transfer or disposition of the property or debts required to be withheld under the provisions of this subsection, he shall be liable to the state to the extent of the value of the property or the amount of the debts thus transferred or paid for any indebtedness due under the provisions of this act from the person with respect to whose obligation the notice was given.

(2) (a) If any sales or use tax amount required to be paid to the state under this act is not paid when due, the Tax Commissioner may, within three years after the amount is due, file for record in the office of any county register of deeds a certificate specifying the amount, interest, and penalty due; the name and address as it appears on the records of the Tax Commissioner of the person liable for the same, and the fact that the Tax Commissioner has complied with all provisions of this act in the determination of the amount required to be paid.

(b) (i) When the certificate provided for in subdivision (2) (a) of this section is filed with any register of deeds it shall constitute a lien from the time of filing upon all real property of the named individual located in such county. Upon the filing of such certificate, the register of deeds shall enter the same in an alphabetical state tax lien index, showing on one line the name and residence of the taxpayer named in

such notice, the Tax Commissioner's serial number of such notice, the date and hour of filing, and the amount due. All original notices shall be retained in numerical order in a file designated state tax lien notices; and

(ii) When a certificate of discharge of any tax lien issued by the Tax Commissioner is filed in the office where the original notice of lien is filed, the appropriate county official shall enter the same with the date of filing in the state tax lien index on the line where notice of the lien so discharged is entered, and shall permanently attach the original certificate of discharge to the original notice of lien.

(c) From the time of the filing for record, the amount required to be paid together with interest and penalty shall constitute a lien upon all real property in the county owned by the person or afterwards and before the lien expires acquired by him. The lien shall have the force, effect, and priority of a judgment lien and shall continue for five years from the time of the filing of the certificate unless sooner released or otherwise discharged.

(d) The lien may, within five years from the date of the filing of the certificate or within five years from the date of the last extension of the lien in the manner provided in this subsection, be extended by filing for record a new certificate in the office of the county register of deeds of any county, and from the time of such filing, the lien shall be extended to the real property in such county for five years, unless sooner released or otherwise discharged.

(e) The Tax Commissioner may at the request of the person involved at any time release all or any portion of the property subject to any lien provided for in this act from the lien or subordinate the lien to other liens and encumbrances if he determines that the amount, interest, and penalties have been paid or are secured sufficiently by a lien on other property or that the release or subordination of the lien will not jeopardize the collection of the amount, interest, and penalties.

(f) A certificate by the Tax Commissioner to the effect that any property has been released from the lien, or that the

lien has been subordinated to other liens and encumbrances, shall be conclusive evidence that the property has been released, or that the lien has been subordinated as provided in the certificate.

(3) (a) At any time within three years after any amount of sales or use tax to be collected under the provisions of this act becomes due and payable or within three years after the last recording of a certificate under subsection (2) of this section, the Tax Commissioner may bring an action in the courts of this state, or any other state, or of the United States, in the name of the people of the State of Nebraska, to collect the amount delinquent together with penalties and interest.

(b) The Attorney General shall prosecute the action, and the rules of civil procedure relating to service of summons, pleadings, proofs, trials, and appeals shall be applicable to the proceedings.

(c) In the action a writ of attachment may issue, and no bond or affidavit previous to the issuing of the attachment shall be required.

(d) In the action a certificate by the Tax Commissioner showing the delinquency shall be prima facie evidence of the determination of such tax or the amount of such tax, the delinquency of the amounts set forth, and of the compliance by the Tax Commissioner with all the provisions of this act in relation to the computation and determination of the amounts.

(e) In any action relating to the use tax brought under the provisions of this act, process may be served according to the rules of civil procedure or may be served upon any agent or clerk in this state employed by any retailer in a place of business maintained by the retailer in this state. In the latter case, a copy of the process shall forthwith be sent by registered or certified mail to the retailer at his principal or home office.

(f) (i) The sales and use tax amounts required to be paid by any person under the provisions of this act together with interest and penalties shall be satisfied first in any of the following cases: Whenever the person is insolvent; whenever

the person makes a voluntary assignment of his assets; whenever the estate of the person in the hands of executors, administrators, or heirs is insufficient to pay all the debts due from the deceased; or whenever the estate and effects of an absconding, concealed, or absent person required to pay any amount under this act are levied upon by process of law; and

(ii) This section shall not give the state a preference over any recorded lien which attached prior to the date when the amounts required to be paid become a lien, or any preference over costs of administration, funeral expenses, expenses of last illness, family allowances, or debts preferred by the laws of the United States.

(g) When a judgment has been obtained for the recovery of any sales or use tax, interest, and penalties as provided in this act, the Tax Commissioner shall cause such judgment to be enforced and collected in the same manner as provided by the laws of this state for the enforcement and collection of other judgments for the recovery of money.

(4) (a) At any time within three years after any person is delinquent in the payment of any sales or use tax under the provisions of this act, the Tax Commissioner may forthwith collect the amount in the following manner: The Tax Commissioner shall seize any personal property, other than property exempt from execution under the laws of this state, of the person and sell the property, or a sufficient part of it, at public auction to pay the amount due together with any interest or penalties imposed for the delinquency and any costs incurred on account of a seizure and sale. Any seizure made to collect a sales tax due shall be only of property of the vendor not exempt from execution under the laws of this state.

(b) Notice of the sale and the time and place thereof shall be given to the delinquent person in writing at least twenty days before the date set for the sale in the following manner: The notice shall be enclosed in an envelope addressed to the person, in case of a sale for retail sales taxes due, at his last-known address or place of business, and, in case of a sale for use taxes due, at his last-known residence or place of business in this state. It shall be deposited in the

United States mail, postage prepaid. The notice shall also be published for at least ten days before the date set for the sale in a newspaper of general circulation published in the county in which the property seized is to be sold. If there is no newspaper of general circulation in the county, notice shall be posted in three public places in the county twenty days prior to the date set for the sale. The notice shall contain a description of the property to be sold, a statement of the amount due, including interest, penalties, and costs, the name of the delinquent, and the further statement that unless the amount due, interest, penalties, and costs, are paid on or before the time fixed in the notice for the sale, the property, or so much of it as may be necessary, will be sold in accordance with law and the notice.

(c) At the sale the Tax Commissioner shall sell the property in accordance with law and the notice and shall deliver to the purchaser a bill of sale for the personal property. The bill of sale shall vest the interest or title of the person liable for the amount in the purchaser. The unsold portion of any property seized may be left at the place of sale at the risk of the person liable for the amount.

(d) Whenever any property which is seized and sold under the provisions of this subsection is not sufficient to satisfy the claim of the state for which distraint or seizure is made, the sheriff, constable, or deputy commissioner may thereafter, and as often as the same may be necessary, proceed to seize and sell in like manner any other property liable to seizure of the taxpayer against whom such claim exists, until the amount due from such taxpayer, together with all expenses, is fully paid.

(e) If upon the sale the money received exceeds the total of all amounts, including interest, penalties, and costs due the state, the Tax Commissioner shall return the excess to the person liable for the amounts and obtain his receipts. If any person having an interest in or lien upon the property files with the Tax Commissioner prior to the sale notice of his interest or lien, the Tax Commissioner shall withhold any excess pending a determination of the rights of the respective parties thereto by a court of competent jurisdiction. If for

any reason the receipt of the person liable for the amount is not available, the Tax Commissioner shall deposit the excess money with the State Treasurer, as trustee for the owner, subject to the order of the person liable for the amount, his heirs, successors, or assigns. No interest earned, if any, will become the property of the person liable for the amount.

(5) No injunction or writ of mandamus or other legal or equitable process shall issue in any suit, action, or proceeding in any court against this state to enjoin the collection under the provisions of this act of any tax or any amount of tax required to be collected.

Sec. 13. (1) Any person required under the provisions of sections 2 to 13 of this act to collect, account for, or pay over any tax imposed by this act, who willfully fails to collect or truthfully account for or pay over such tax, and any person who willfully attempts in any manner to evade any tax imposed by such provisions of this act or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and shall, upon conviction thereof, be fined not more than ten thousand dollars, or be imprisoned for not more than five years, or both.

(2) Any person who willfully aids or assists in, or procures, counsels, or advises, the preparation or presentation of a false or fraudulent return, affidavit, claim, or document under or in connection with any matter arising under the provisions of sections 2 to 13 of this act, shall, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document, be guilty of a felony and shall, upon conviction thereof, be fined not more than ten thousand dollars, or be imprisoned for not more than five years, or both.

(3) A person who engages in business as a retailer in this state without a permit or permits or after a permit has been suspended, and each officer of any corporation which so engages in business, shall be guilty of a misdemeanor. Each day of such operation shall constitute a separate offense, and upon conviction thereof such person and each such officer

shall be fined not to exceed five hundred dollars for each violation.

(4) Any person who gives a resale certificate to the seller for property which he knows, at the time of purchase, is purchased for the purpose of use rather than for the purpose of resale, lease, or rental by him in the regular course of business shall be guilty of a misdemeanor, and shall, upon conviction thereof, be fined not to exceed five hundred dollars for each violation.

(5) Any violation of the provisions of sections 2 to 13 of this act, except as otherwise provided, shall be a misdemeanor, and any person found guilty of any such violation shall be fined not to exceed five hundred dollars for each violation.

(6) Any prosecution under the provisions of sections 2 to 13 of this act shall be instituted within three years after the commission of the offense; *Provided*, that if such offense is the failure to do an act required by or under the provisions of such sections of this act to be done before a certain date, a prosecution for such offense may be commenced not later than three years after such date. The failure to do any act required by or under the provisions of sections 2 to 13 of this act shall be deemed an act committed in part at the principal office of the Tax Commissioner. Any prosecution under the provisions of this act may be conducted in any county where the person or corporation to whose liability the proceeding relates resides, or has a place of business or in any county in which such crime is committed. The Attorney General shall have concurrent jurisdiction with the county attorney in the prosecution of any offenses under the provisions of this act.

(7) Any corporate officer or employee with the duty to pay taxes imposed upon a corporation or to perform some other act required of a corporation shall be personally liable for the payment of such taxes or penalties in the event of willful failure on his part to perform such act.

(b) Income Tax

Sec. 14. Any term used in sections 14 to 124 of this act

shall have the same meaning as when used in a comparable context in the laws of the United States relating to federal income taxes, unless a different meaning is clearly required. Any reference to the laws of the United States shall mean the provisions of the Internal Revenue Code of 1954, and amendments thereto, other provisions of the laws of the United States relating to federal income taxes, and the rules and regulations issued under such laws, as the same may be or become effective, at any time or from time to time, for the taxable year. All other references contained within sections 14 to 124 of this act refer to income tax unless the contrary appears. Any organization to the extent that it is exempt from income taxes under the laws of the United States shall be exempt under the provisions of this act.

Sec. 15. (1) A tax is hereby imposed for each taxable year on the entire income of every resident individual of this state and on the income of every nonresident individual of this state which is derived from sources within this state. The tax shall be a flat percentage of, for each resident individual, the taxpayer's adjusted federal income tax liability for the taxable year, and for each nonresident individual, the taxpayer's adjusted federal income tax liability for the taxable year which is attributable to income derived from sources within this state.

The taxpayer's adjusted federal income tax liability shall be the amount of federal income tax for which the taxpayer would have been liable if such taxpayer had paid federal income tax based on federal taxable income as adjusted by the modifications provided in section 16 of this act without any allowance for credits against such tax permitted under the Internal Revenue Code.

The adjusted federal income tax liability of each nonresident individual taxpayer which is attributable to income derived from sources within this state shall be determined by multiplying his adjusted federal income tax liability by a fraction, the numerator of which is his taxable income derived from sources within this state as determined by section 33 of this act, and the denominator of which is his total federal

taxable income, after first subtracting from each the amounts provided in subsection (1) of section 16 of this act; *Provided*, that if the above determination attributes more or less federal income tax than is reasonably attributable to income derived from sources within this state, the taxpayer may petition for, or the Tax Commissioner may require, the employment of any other method to attribute an amount of federal income tax which is reasonable and equitable in the circumstances.

The State Board of Equalization and Assessment shall set the rate of tax imposed by this subsection on or before November 15 of each year for the taxable year beginning during the subsequent calendar year. For any taxpayer whose fiscal year does not coincide with the calendar year, the rate initially set shall also apply for the period from January 1, 1968, to the last day of his then current fiscal year. In fixing the rate, the State Board of Equalization and Assessment shall:

(a) First determine the status of all fixed appropriations for the biennium, which appropriations must be financed from receipts from any in lieu of tax payments, receipts from sales and use taxes, receipts from income and franchise taxes, and unappropriated miscellaneous receipts and fees to the General Fund, from a certified statement of all appropriations made by the most recent session of the Legislature, which statement the Director of Administrative Services shall prepare and furnish prior to the convening of such board;

(b) Take one half of the amount of appropriations determined pursuant to subdivision (a) of this subsection in setting the rate imposed by this subsection;

(c) If the Legislature shall meet during any year, the board shall add to the amount determined pursuant to subdivision (b) of this subsection, the appropriation for the legislative session, all miscellaneous claims, deficiency bills, and all emergency appropriations;

(d) From the total amount of the appropriation determined pursuant to subdivisions (a), (b), and (c) of this subsection, the board shall subtract the estimated receipts from any in lieu of tax payments, the estimated receipts from sales and use taxes, and the estimated unappropriated miscellaneous

receipts and fees to the General Fund which will be received during the fiscal year which begins in the calendar year prior to the calendar year in which the rate set pursuant to this subsection becomes effective. The board shall also subtract any unappropriated surpluses in the General Fund, Miscellaneous Cash Fund, and unobligated cash funds; and

(e) Then set the rate of the tax so that the proceeds from the income and franchise taxes imposed by this act shall produce revenue to the State of Nebraska in an amount estimated to be not less than five per cent in excess of the amount remaining after the subtraction required in subdivision (d) of this subsection. If the rate so determined shall be other than a whole per cent, it shall be rounded to the next higher whole per cent.

(2) (a) A resident of this state shall mean an individual who is domiciled in Nebraska or who maintains a permanent place of abode in this state and spends in the aggregate more than six months of the taxable year in this state; and

(b) A nonresident shall mean an individual who is not a resident of this state.

(3) (a) There shall also be allowed to resident individuals as a credit against the tax imposed by this act, a food sales tax credit equal to seven dollars multiplied by the number of allowable personal exemptions claimed for individuals who are residents, exclusive of the extra exemptions allowable for age or blindness. A refund shall be allowed to the extent that the food sales tax credit exceeds the income tax payable by the resident individual for the taxable year but no refund shall be made in any amount less than two dollars.

(b) No individual who may be claimed as a personal exemption on another individual's return shall be entitled to a food sales tax credit or refund for himself. If a food sales tax credit or refund is claimed on more than one return for the same individual, the Tax Commissioner is authorized to determine the individual entitled to claim the credit or refund provided herein.

(c) Any individual, other than a person who for more than six months of the taxable year is a resident patient or

inmate of a public institution or an organization exempt from tax as a charitable institution, who maintains a permanent place of abode within this state, spending in the aggregate more than six months of the taxable year within this state, shall be conclusively presumed to have paid or paid with respect to such personal exemptions retail sales and use taxes imposed by this state equal to the maximum food sales tax credit allowable.

(d) The credits or refunds for sales taxes allowed by this subsection shall be claimed on income tax returns or in the case of an individual not having tax liability in this state on such forms or claims for refunds as the Tax Commissioner shall prescribe.

Sec. 16. (1) There shall be subtracted from federal taxable income interest or dividends on obligations of the United States and its territories and possessions or of any authority, commission or instrumentality of the United States to the extent includible in gross income for federal income tax purposes but exempt from state income taxes under the laws of the United States; *Provided,* that the amount subtracted under the provisions of this subsection shall be reduced by any interest on indebtedness incurred to carry the obligations or securities described in this subsection, and by any expenses incurred in the production of interest or dividend income described in this subsection to the extent that such expenses, including amortizable bond premiums, are deductible in determining federal taxable income.

(2) There shall be added to or subtracted from federal taxable income, as the case may be, the taxpayer's share of the fiduciary adjustment determined under the provisions of section 20 of this act.

Sec. 17. The tax imposed on, and the computation of the tax for, individuals shall apply to the tax liability of all estates and trusts except those trusts taxed as a corporation under the Internal Revenue Code.

Sec. 18. A resident estate or trust means: (1) The estate of a decedent who at his death was domiciled in this

state; (2) a trust created by will of a decedent who at his death was domiciled in this state; or (3) an inter vivos trust created by, or consisting of property of, a person domiciled in this state.

Sec. 19. The tax liability of a resident estate or trust means its federal tax liability modified by the addition or subtraction, as the case may be, of its share of the fiduciary adjustment determined under the provisions of section 20 of this act.

Sec. 20. (1) The fiduciary adjustment shall be the net amount of the modifications described in section 22 of this act, including subsection (2) of section 22 of this act, if the estate or trust is a beneficiary of another estate or trust, which relates to items of income or deduction of an estate or trust.

(2) The respective shares of an estate or trust and its beneficiaries, including solely for the purpose of this allocation, nonresident beneficiaries, in the fiduciary adjustment shall be in proportion to their respective shares of federal distributable net income of the estate or trust. If the estate or trust has no federal distributable net income for the taxable year, the share of each beneficiary in the fiduciary adjustment shall be in proportion to his share of the estate or trust income for such year, under local law or the terms of the instrument, which is required to be distributed currently and any other amounts of such income distributed in such year. Any balance of the fiduciary adjustment shall be allocated to the estate or trust.

(3) The Tax Commissioner may by regulation authorize the use of such other methods of determining to whom the items comprising the fiduciary adjustment shall be attributed, as may be appropriate and equitable, on such terms and conditions as the Tax Commissioner may require.

Sec. 21. A resident estate or trust shall be allowed the credit provided in section 30 of this act, relating to an income tax imposed by another state, except that the limitation shall be computed by reference to the tax liability of the estate or trust.

Sec. 22. (1) A resident beneficiary of a trust whose taxable income includes all or part of an accumulation distribution by such trust, as defined in the laws of the United States, shall be allowed a credit against the tax otherwise due for all or a proportionate part of any tax paid by the trust for any preceding taxable year which would not have been payable if the trust had in fact made distribution to its beneficiaries at the times and in the amounts specified in the laws of the United States.

(2) The credit under the provisions of this section shall not reduce the tax otherwise due from the beneficiary to an amount less than would have been due if the accumulation distribution or his part thereof were excluded from his taxable income.

Sec. 23. A nonresident estate or trust means an estate or trust which is not a resident estate or trust as defined herein.

Sec. 24. (1) For purposes of taxation of nonresident estates or trusts:

(a) Items of income, gain, loss, and deduction mean those derived from or connected with sources in this state;

(b) Items of income, gain, loss, and deduction entering into the definition of federal distributable net income include such items from another estate or trust of which the estate or trust is a beneficiary; and

(c) The source of items of income, gain, loss or deduction shall be determined under regulations prescribed by the Tax Commissioner in accordance with the general rules in section 33 of this act as if the estate or trust were a nonresident individual.

(2) The taxable income of a nonresident estate or trust consists of (a) its share of items of income, gain, loss, and deduction which enter into the federal definition of distributable net income; (b) increased or reduced by the amount of any items of income, gain, loss, or deduction which are recognized for federal income tax purposes but excluded from the federal definition of distributable net income of the estate or

trust; and (c) less the amount of the deduction for its federal exemption.

Sec. 25. (1) The share of a nonresident estate or trust of items of income, gain, loss, and deduction entering into the definition of distributable net income and the share for purposes of section 33 of this act of a nonresident beneficiary of any estate or trust in estate or trust income, gain, loss, and deduction shall be determined as follows:

(a) To the amount of items of income, gain, loss, and deduction which enter into the definition of distributable net income there shall be added or subtracted, as the case may be, the modifications described in section 22 of this act to the extent they relate to items of income, gain, loss, and deduction which also enter into the definition of distributable net income. No modification shall be made under this section which has the effect of duplicating an item already reflected in the definition of distributable net income;

(b) The amount determined under subdivision (1) (a) of this section shall be allocated among the estate or trust and its beneficiaries, including, solely for the purpose of this allocation, resident beneficiaries, in proportion to their respective shares of federal distributable net income. The amounts so allocated shall have the same character as for federal income tax purposes. Where an item entering into the computation of such amounts is not characterized for federal income tax purposes, it shall have the same character as if realized directly from the source from which realized by the estate or trust, or incurred in the same manner as incurred by the estate or trust; and

(c) If the estate or trust has no federal distributable net income for the taxable year, the share of each beneficiary in the net amount determined under subdivision (1) (a) of this section shall be in proportion to his share of the estate or trust income for such income distributed in such year. Any balance of such net amount shall be allocated to the estate or trust.

(2) The Tax Commissioner may by regulation establish such other method or methods of determining the respective

shares of the beneficiaries and of the estate or trust in its income derived from sources in this state, and in the modifications related thereto, as may be appropriate and equitable.

Sec. 26. A nonresident beneficiary of a trust whose taxable income derived from sources in this state includes all or part of an accumulation distribution by such trust, as defined in the laws of the United States, shall be allowed a credit against the tax otherwise due under this act, computed in the same manner and subject to the same limitation as provided by section 22 of this act with respect to a resident beneficiary.

Sec. 27. A partnership as such shall not be subject to the income tax imposed by the provisions of this act. Persons or their authorized representatives carrying on business as partners shall be liable for the income tax imposed by the provisions of this act only in their separate or individual capacities.

Sec. 28. Each item of partnership income, gain, loss, or deduction shall have the same character for a partner under the provisions of this act as it has for federal income tax purposes. Where an item is not characterized for federal income tax purposes, it shall have the same character for a partner as if realized directly from the source from which realized by the partnership or incurred in the same manner as incurred by the partnership.

Sec. 29. (1) In determining the taxable income of a nonresident partner of any partnership, there shall be included only that part derived from or connected with sources in this state of the partner's distributive share of items of partnership income, gain, loss, and deduction entering into his federal taxable income, as such part is determined under regulations prescribed by the Tax Commissioner in accordance with the general rules in section 33 of this act.

(2) In determining the sources of a nonresident partner's income, no effect shall be given to a provision in the partnership agreement which:

(a) Characterizes payments to the partner as being for services or for the use of capital, or allocated to the partner, as income or gain from sources outside this state, a greater proportion of his distributive share of partnership income or gain than the ratio of partnership income or gain from sources outside this state to partnership income or gain from all sources, except as authorized in subsection (4) of this section; or

(b) Allocates to the partner a greater proportion of a partnership item of loss or deduction connected with sources in this state than his proportionate share, for federal income tax purposes, of partnership loss or deduction generally, except as authorized in subsection (4) of this section.

(3) Any modification described in subsection (1) of section 16 of this act which relates to an item of partnership income, gain, loss, or deduction, shall be made in accordance with the partner's distributive share, for federal income tax purposes of the item to which the modification relates, but limited to the portion of such item derived from or connected with sources in this state.

(4) The Tax Commissioner may, on application, authorize the use of such other methods of determining a nonresident partner's portion of partnership items derived from or connected with sources in this state, and the modifications related thereto, as may be appropriate and equitable, on such terms and conditions as he may require.

(5) The character of partnership items for a nonresident partner shall be determined under the provisions of section 25 of this act.

Sec. 30. (1) A resident individual shall be allowed a credit against the income tax otherwise due for the amount of any income tax imposed on him for the taxable year by another state of the United States or a political subdivision thereof or the District of Columbia on income derived from sources therein and which is also subject to income tax under the provisions of sections 14 to 124 of this act.

(2) The credit provided under the provisions of this act shall not exceed the proportion of the income tax otherwise

due under the provisions of this act that the amount of the taxpayer's taxable income derived from sources in the other taxing jurisdiction bears to his entire taxable income as modified herein.

Sec. 31. If the taxpayer is regarded as a resident both of this state and another jurisdiction for purposes of personal income taxation, the Tax Commissioner shall reduce the tax on that portion of the taxpayer's income which is subjected to tax in both jurisdictions solely by virtue of dual residence; *Provided,* that the other taxing jurisdiction allows a similar reduction. The reduction shall be in an amount equal to that portion of the lower of the two taxes applicable to the income taxed twice which the tax imposed by this state bears to the combined taxes of the two jurisdictions on the income taxed twice.

Sec. 32. (1) If the federal tax liability of husband or wife, both nonresidents of this state, is determined on separate federal returns, their tax liabilities in this state shall be separately determined.

(2) If the federal tax liability of husband and wife, both nonresidents, is determined on a joint federal return, their tax liability shall be determined in this state on their joint federal tax liability.

(3) If either husband or wife is a nonresident and the other a resident, separate taxes shall be determined on their separate tax liabilities in this state on such forms as the Tax Commissioner shall prescribe unless both elect to determine their joint tax liability in this state as if both were residents. If a husband and wife file a joint federal income tax return but determine their tax liabilities in this state separately, they shall compute their tax liabilities in this state as if their federal tax liabilities had been determined separately.

Sec. 33. (1) The taxable income of a nonresident derived from sources within this state shall be the sum of the following:

(a) The net amount of items of income, gain, loss, and

deduction entering into his federal taxable income which are derived from or connected with sources in this state including (i) his distributive share of partnership income and deductions determined under the provisions of section 29 of this act; (ii) his share of small business corporation taxable income determined under the provisions of section 34 of this act; and (iii) his share of estate or trust income and deductions determined under the provisions of section 25 of this act;

(b) The portion of the modifications described in subsection (1) of section 16 of this act which relates to income derived from sources in this state, including any modifications attributable to him as a partner; and

(c) The amount of the standard deduction or itemized deductions and the personal exemptions allowable for a nonresident shall be limited by the percentage which his adjusted gross income from sources within this state is to his entire adjusted gross income.

(2) Items of income, gain, loss, and deduction derived from or connected with sources within this state are those items attributable to:

(a) The ownership or disposition of any interest in real or tangible personal property in this state; and

(b) A business, trade, profession, or occupation carried on in this state.

(3) Income from intangible personal property including annuities, dividends, interest, and gains from the disposition of intangible personal property, shall constitute income derived from sources within this state only to the extent that such income is from property employed in a business, trade, profession, or occupation carried on in this state.

(4) Deductions with respect to capital losses, net long-term capital gains, and net operating losses shall be based solely on income, gains, losses, and deductions derived from or connected with sources in this state, under regulations to be prescribed by the Tax Commissioner but otherwise shall be determined in the same manner as the corresponding federal deductions.

(5) If a business, trade, profession, or occupation is carried on partly within and partly without this state, the items of income and deduction derived from or connected with sources within this state shall be determined by apportionment and allocation under regulations to be prescribed by the Tax Commissioner.

(6) Compensation paid by the United States for service in the armed forces of the United States performed by a nonresident shall not constitute income derived from sources within this state.

Sec. 34. (1) A tax is hereby imposed for each taxable year on the taxable income derived from sources within this state of any corporation or any other entity taxed as a corporation under the Internal Revenue Code whose business within this state during the taxable year consists exclusively of foreign commerce, interstate commerce, or both, at a rate equal to twenty per cent of the rate imposed on individuals under section 15 of this act. For any taxpayer subject to this section whose fiscal year does not coincide with the calendar year, the rate initially set shall also apply for the period from January 1, 1968, to the last day of his then current fiscal year.

(2) Except as provided in subsection (1) of this section, for the privilege of exercising its franchise or doing business in this state in a corporate capacity, there is hereby imposed a franchise tax on each corporation or any other entity taxed as a corporation under the Internal Revenue Code according to or measured by its entire net income derived from all sources within this state for the taxable year at the rate imposed under subsection (1) of this section. For the purposes of this subsection the taxpayer's entire net income shall be its federal taxable income derived from sources within this state as determined pursuant to sections 35 to 49 of this act without regard to the modification referred to in section 41 of this act, the State of Nebraska hereby adopting method numbered (4) authorized by section 5219, United States Revised Statutes, as amended, 12 USC 548, for state taxation of national banking associations. The tax imposed by this subsection on national banking associations shall be in lieu of all taxes imposed by

this state on national banking associations to the extent it is not permissible to tax such associations under federal law. All provisions of sections 14 to 124 of this act relating to taxation of corporations shall apply to franchise taxes imposed under this subsection unless the context requires otherwise.

Any (a) corporation subject to tax under section 44-1213, 77-908, 77-909, or 81-523, Reissue Revised Statutes of Nebraska, 1943, (b) corporations organized as cooperatives under Chapter 21, article 13, Reissue Revised Statutes of Nebraska, 1943, and amendments thereto, (c) electric cooperatives organized under Chapter 70, article 7, Reissue Revised Statutes of Nebraska, 1943, (d) nonstock cooperative marketing companies organized under Chapter 21, article 14, Reissue Revised Statutes of Nebraska, 1943, (e) savings and loan associations, (f) production credit associations, (g) persons licensed to engage in this state in the business of purchasing installment paper, (h) installment loan companies, (i) credit unions, (j) mutual investment companies, (k) banks for cooperatives, and (l) industrial loan and investment companies, shall be credited, in the computation of tax due under the provisions of this section, with the amount paid during the taxable year as taxes in lieu of intangible tax.

(3) A small business corporation having an election in effect under subchapter S of the Internal Revenue Code shall not be subject to the Nebraska income tax or franchise tax on corporations, and the shareholders of such corporation shall include in their taxable incomes their proportionate part of such corporation's federal taxable income; *Provided,* that if any of the shareholders of such corporation are nonresidents during any part of the corporation's taxable year, such corporation shall be subject to the income tax or franchise tax, as the case may be, for such year on that part of the corporation's income, as determined under the provisions of sections 35 to 49 of this act, allocable to the shares of stock owned by such nonresident unless the corporation files with its return for such year an agreement executed by each nonresident stockholder stating that such nonresident will file a Nebraska income tax return which will include in his Ne-

braska nonresident adjusted gross income that portion of the corporation's Nebraska taxable income allocable to such nonresident's interest in such corporation.

Sec. 35. As used in sections 35 to 52 of this act, unless the context otherwise requires:

(1) Business income shall mean income arising from transactions and activity in the regular course of the taxpayer's trade or business and includes income from tangible and intangible property if the acquisition, management, and disposition of the property constitute integral parts of the taxpayer's regular trade or business operations;

(2) Commercial domicile shall mean the principal place from which the trade or business of the taxpayer is directed or managed;

(3) Compensation shall mean wages, salaries, commissions and any other form of remuneration paid to employees for personal services;

(4) Nonbusiness income shall mean all income other than business income;

(5) Sales shall mean all gross receipts of the taxpayer not allocated under the provisions of sections 38 to 42 of this act; and

(6) State shall mean any state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, and any foreign country or political subdivision thereof.

Sec. 36. Any corporation or any other entity taxed as a corporation under the Internal Revenue Code having income from business activity which is taxable both within and without this state shall allocate and apportion its net income as provided in sections 38 to 52 of this act.

Sec. 37. For purposes of allocation and apportionment of income, a taxpayer is taxable in another state if (1) in that state he is subject to a net income tax, a franchise tax measured by net income, a franchise tax for the privilege of doing

business, or a corporate stock tax, or (2) that state has jurisdiction to subject the taxpayer to a net income tax regardless of whether, in fact, the state does or does not.

Sec. 38. Rents and royalties from real or tangible personal property, capital gains, interest, dividends, or patent or copyright royalties, to the extent that they constitute nonbusiness income, shall be allocated as provided in sections 38 to 42 of this act.

Sec. 39. (1) Net rents and royalties from real property located in this state are allocable to this state.

(2) Net rents and royalties from tangible personal property are allocable to this state:

(a) If and to the extent that the property is utilized in this state; or

(b) In their entirety if the taxpayer's commercial domicile is in this state and the taxpayer is not organized under the laws of or taxable in the state in which the property is utilized.

(3) The extent of utilization of tangible personal property in a state is determined by multiplying the rents and royalties by a fraction, the numerator of which is the number of days of physical location of the property in the state during the rental or royalty period in the taxable year and the denominator of which is the number of days of physical location of the property everywhere during all rental or royalty periods in the taxable year. If the physical location of the property during the rental or royalty period is unknown or unascertainable by the taxpayer, tangible personal property is utilized in the state in which the property was located at the time the rental or royalty payer obtained possession.

Sec. 40. (1) Gains and losses from sales of real property located in this state are allocable to this state.

(2) Gains and losses from sales of tangible personal property are allocable to this state if:

(a) The property had a situs in this state at the time of the sale; or

(b) The taxpayer's commercial domicile is in this state and the taxpayer is not taxable in the state in which the property has a situs.

(3) Gains and losses from sales of intangible personal property are allocable to this state if the taxpayer's commercial domicile is in this state.

Sec. 41. Interest and dividends are allocable to this state if the taxpayer's commercial domicile is in this state, subject to the modifications provided by section 16 of this act.

Sec. 42. (1) Patent and copyright royalties are allocable to this state:

(a) If and to the extent that the patent or copyright is utilized by the payer in this state; or

(b) If and to the extent that the patent or copyright is utilized by the payer in a state in which the taxpayer is not taxable and the taxpayer's commercial domicile is in this state.

(2) A patent is utilized in a state to the extent that it is employed in production, fabrication, manufacturing, or other processing in the state or to the extent that a patented product is produced in the state. If the basis of receipts from patent royalties does not permit allocation to states or if the accounting procedures do not reflect states of utilization, the patent is utilized in the state in which the taxpayer's commercial domicile is located.

(3) A copyright is utilized in a state to the extent that printing or other publication originates in the state. If the basis of receipts from copyright royalties does not permit allocation to states or if the accounting procedures do not reflect states of utilization, the copyright is utilized in the state in which the taxpayer's commercial domicile is located.

Sec. 43. All business income shall be apportioned to this state as follows:

(1) If the portion of taxable income derived from sources within Nebraska is separate and distinct from the portion derived from sources without Nebraska, it shall be separately determined and reported without the use of the apportionment factors provided in sections 44 to 52 of this act; or

(2) If the portion of taxable income derived from sources within Nebraska cannot be readily separated from the portion derived from sources without Nebraska, it shall be determined by multiplying the taxpayer's entire taxable income by a fraction, the numerator of which is the property factor plus the payroll factor plus the sales factor, and the denominator of which is three.

Sec. 44. The property factor is a fraction, the numerator of which is the average value of the taxpayer's real and tangible personal property owned or rented and used in this state during the tax period and the denominator of which is the average value of all the taxpayer's real and tangible personal property owned or rented and used during the tax period.

Sec. 45. Property owned by the taxpayer is valued at its original cost. Property rented by the taxpayer is valued at eight times the net annual rental rate. Net annual rental rate is the annual rental rate paid by the taxpayer less any annual rental rate received by the taxpayer from subrentals.

Sec. 46. The average value of property shall be determined by averaging the values at the beginning and ending of the tax period but the Tax Commissioner may require the averaging of monthly values during the tax period if reasonably required to reflect properly the average value of the taxpayer's property.

Sec. 47. The payroll factor is a fraction, the numerator of which is the total amount paid in this state during the tax period by the taxpayer for compensation, and the denominator of which is the total compensation paid everywhere during the tax period.

Sec. 48. Compensation is paid in this state if:

(1) The individual's service is performed entirely within the state;

(2) The individual's service is performed both within and without the state, but the service performed without the state is incidental to the individual's service within the state; or

(3) Some of the service is performed in the state and (a) the base of operations, or, if there is no base of operations, the place from which the service is directed or controlled is in this state, or (b) the base of operations or the place from which the service is directed or controlled is not in any state in which some part of the service is performed, but the individual's residence is in this state.

Sec. 49. The sales factor is a fraction, the numerator of which is the total sales of the taxpayer in this state during the tax period, and the denominator of which is the total sales of the taxpayer everywhere during the tax period.

Sec. 50. Sales of tangible personal property are in this state if:

(1) The property is delivered or shipped to a purchaser, other than the United States government, within this state regardless of the f.o.b. point or other conditions of the sale; or

(2) The property is shipped from an office, store, warehouse, factory, or other place of storage in this state and (a) the purchaser is the United States government, or (b) the taxpayer is not taxable in the state of the purchaser.

Sec. 51. Sales, other than sales of tangible personal property, are in this state, if:

(1) The income-producing activity is performed in this state; or

(2) The income-producing activity is performed both in and outside this state and a greater proportion of the income-producing activity is performed in this state than in any other state, based on costs of performance.

Sec. 52. (1) If the allocation and apportionment provisions contained herein do not fairly represent the taxpayer's taxable income that is reasonably attributable to business or earnings within this state, the taxpayer may petition for or the Tax Commissioner may require, in respect to all or any part of the taxpayer's taxable income, if reasonable:

(a) Separate accounting;

(b) The exclusion of any one or more of the factors;

(c) The inclusion of one or more additional factors which will fairly represent the taxpayer's taxable income in this state; or

(d) The employment of any other method to effectuate an equitable allocation and apportionment of the taxpayer's income.

(2) If the Tax Commissioner fails to mail a notice of final action on any petition filed under the provisions of this section within thirty days after filing such petition, the taxpayer may, prior to notice of action on the petition consider the petition denied.

Sec. 53. (1) Every employer maintaining an office or transacting business within this state and making payment of any wages taxable under the provisions of this act to a resident or nonresident individual whose wages are subject to withholding under the Internal Revenue Code shall deduct and withhold from such wages for each payroll period a tax computed in such manner as to result, sofar as practicable, in withholding from the employee's wages during each calendar year an amount substantially equivalent to the tax reasonably estimated to be due from the employee under the provisions of this act with respect to the amount of such wages included in his taxable income during the calendar year. The method of determining the amount to be withheld shall be prescribed by regulations of the Tax Commissioner. The provisions of this section shall not apply to payments by the United States for service in the armed forces of the United States.

(2) For purposes of this section an employee shall be entitled to the same number of withholding exemptions as

the number of withholding exemptions to which he is entitled for federal income tax withholding purposes. An employer may rely upon the number of federal withholding exemptions claimed by the employee.

(3) The Tax Commissioner may enter into agreements with the tax departments of other states, which require income tax to be withheld from the payment of wages and salaries, so as to govern the amounts to be withheld from the wages and salaries of residents of such states. Such agreements may provide for recognition of anticipated tax credits in determining the amounts to be withheld and, under regulations prescribed by the Tax Commissioner, may relieve employers in this state from withholding income tax on wages and salaries paid to nonresident employees. The agreements authorized by this subsection are subject to the condition that the tax department of such other states grant similar treatment to residents of this state.

Sec. 54. Every employer, making payment of wages, shall furnish to each employee in respect to the wages paid by such employer to such employee during the calendar year on or before February 15 of the succeeding year, or, if his employment is terminated before the close of such calendar year, within thirty days from the date on which the last payment of wages is made, a written statement as prescribed by the Tax Commissioner showing the amount of wages paid by the employer to the employee, the amount deducted and withheld as tax, and such other information as the Tax Commissioner shall prescribe; *Provided,* that such statement shall be compatible as to form and content with the statement required by the laws of the United States.

Sec. 55. Wages upon which income tax is required to be withheld shall be taxable under the provisions of this act as if no withholding were required, but any amount of income tax actually deducted and withheld under the provisions of this act in any calendar year shall be deemed to have been paid to the Tax Commissioner on behalf of the persom from whom withheld, and such person shall be credited with having paid that amount of income tax for the taxable year begin-

ning in such calendar year. For a taxable year of less than twelve months, the credit shall be made under regulations of the Tax Commissioner.

Sec. 56. (1) Every employer required to deduct and withhold income tax under the provisions of this act shall, for each calendar quarter, on or before the last day of the month following the close of such calendar quarter, file a withholding return as prescribed by the Tax Commissioner and pay over to the Tax Commissioner or to a depositary designated by the Tax Commissioner, the taxes so required to be deducted and withheld, except that for the fourth quarter of the calendar year, the employer shall also file on or before February 15 of the succeeding year a copy of each statement furnished by such employer to each employee with respect to taxes withheld on wages. Where the aggregate amount required to be deducted and withheld by any employer for either the first or second month of a calendar quarter exceeds five hundred dollars, the employer shall by the fifteenth day of the succeeding month pay over such aggregate amount to the Tax Commissioner or to a depositary designated by the Tax Commissioner. The amount so paid shall be allowed as a credit against the liability shown on the employer's quarterly withholding return required by this section. The Tax Commissioner may, by regulation, provide for the filing of returns and the payment of the tax deducted and withheld on other than a quarterly basis.

(2) Whenever any employer fails to collect, truthfully account for, pay over the income tax, or make returns of the income tax as required by this section, the Tax Commissioner may serve a notice requiring such employer to collect the taxes which become collectible after service of such notice, to deposit such taxes in a bank approved by the Tax Commissioner, in a separate account, in trust for and payable to the Tax Commissioner, and to keep the amount of such tax in such account until paid over to the Tax Commissioner. Such notice shall remain in effect until a notice of cancellation is served by the Tax Commissioner.

Sec. 57. Every employer required to deduct and withhold

income tax under the provisions of this act is hereby made liable for such tax. For purposes of assessment and collection, any amount required to be withheld and paid over to the Tax Commissioner, and any additions to tax, penalties and interest with respect thereto, shall be considered the tax of the employer. Any amount of tax actually deducted and withheld shall be held to be a special fund in trust for the Tax Commissioner. No employee shall have any right of action against his employer in respect to any money deducted and withheld from his wages and paid over to the Tax Commissioner in compliance or in intended compliance with the provisions of this act.

Sec. 58. If an employer fails to deduct and withhold income tax as required, and thereafter the tax against which such income tax may be credited is paid, the tax so required to be deducted and withheld shall not be collected from the employer, but the employer shall not be relieved from liability for any additions to tax, penalties or interest otherwise applicable in respect to such failure to deduct and withhold.

Sec. 59. (1) For purposes of the income tax imposed by the provisions of this act, a taxpayer's taxable year shall be the same as his taxable year for federal income tax purposes.

(2) If a taxpayer's taxable year is changed for federal income tax purposes, his taxable year for purposes of the income tax imposed by the provisions of this act shall be similarly changed in accordance with regulations prescribed by the Tax Commissioner.

(3) Notwithstanding the provisions of subsections (1) and (2) of this section, if the Tax Commissioner terminates the taxpayer's taxable year under the provisions of section 111 of this act, relating to tax in jeopardy, the income tax shall be computed for the period determined by such action in accordance with regulations prescribed by the Tax Commissioner.

Sec. 60. (1) For purposes of the income tax imposed by the provisions of this act, a taxpayer's method of accounting

shall be the same as his method of accounting for federal income tax purposes.

(2) If a taxpayer's method of accounting is changed for federal income tax purposes, his method of accounting for purposes of the income tax provisions of this act shall similarly be changed.

Sec. 61. An income tax return with respect to the income tax imposed by the provisions of this act shall be made by the following:

(1) Every resident individual who is required to file a federal income tax return for the taxable year;

(2) Every nonresident individual who has income from sources in this state;

(3) Every resident estate or trust which is required to file a federal income tax return;

(4) Every nonresident estate or trust which has taxable income from sources within this state; and

(5) Every corporation or any other entity taxed as a corporation under the Internal Revenue Code which is required to file a federal income tax return.

Sec. 62. (1) A husband and wife, both residents, may make a joint return with respect to the income tax imposed by the provisions of this act even though one of the spouses has neither gross income nor deductions except that:

(a) No joint return shall be made if the spouses are not permitted to file a joint federal income tax return;

(b) If the federal income tax liability of either spouse is determined on a separate federal return their income tax liabilities under the provisions of this act shall be determined on separate returns; and

(c) If the federal income tax liabilities of husband and wife, other than a husband and wife described in subsection (2) of this section, are determined on a joint federal return,

they shall file a joint return under the provisions of this act and their tax liabilities shall be joint and several.

(2) If either husband or wife is a resident and the other a nonresident, they shall file separate income tax returns in this state on such forms as may be required by the Tax Commissioner in which event their tax liabilities shall be separate; but they may elect to determine their joint taxable income as if both were residents, and in such case, their liabilities shall be joint and several.

Sec. 63. (1) An income tax return for any deceased individual shall be made and filed by his executor, administrator, or other person charged with the care of his property. A joint or separate final return of a decedent shall be due when it would have been due if the decedent had not died.

(2) An income tax return for an individual who is unable to make a return by reason of minority or other disability shall be made and filed by his duly authorized agent, guardian, conservator, fiduciary, or other person charged with the care of his person or property other than a receiver in possession of only a part of the individual's property.

(3) The income tax return of an estate or trust shall be made and filed by the fiduciary thereof.

(4) If two or more fiduciaries are acting jointly, the return may be made by any one of them.

Sec. 64. Every receiver, trustee in bankruptcy, assignee for benefit of creditors, or other like fiduciary, shall give notice of his qualification as such to the Tax Commissioner, as may be required by regulation.

Sec. 65. If an individual changes his status during his taxable year from resident to nonresident or from nonresident to resident, the Tax Commissioner may by regulation require him to file one return for the portion of the year during which he is a resident and one for the portion of the year during which he is a nonresident.

Sec. 66. (1) Except as provided in subsection (2) of

this section, the taxable income of the individual shall be determined for nonresidents as if the individual's taxable year for federal income tax purposes were limited to the period of his resident and nonresident status respectively.

(2) There shall be included in determining taxable income from sources within or without this state, as the case may be, income, gain, loss, or deductions accrued prior to the change of status even though not otherwise includible or allowable in respect of the period prior to such change, but the taxation or deduction of items accrued prior to the change of status shall not be affected by the change.

Sec. 67. Where two returns are required to be filed as provided in section 65 of this act:

(1) Personal exemptions and deductions shall be prorated between the two returns, under regulations prescribed by the Tax Commissioner, to reflect the proportions of the taxable year during which the individual was a resident and a nonresident; and

(2) The total of the taxes due thereon shall not be less than would be due if the total of the taxable incomes reported on the two returns were includible in one return.

Sec. 68. The income tax return required by the provisions of this act shall be filed on or before the dates prescribed by the laws of the United States for filing federal income tax returns. A person required to make and file an income tax return shall, without assessment, notice or demand, pay any tax due thereon to the Tax Commissioner on or before the date fixed for filing such return, determined without regard to any extension of time for filing the return. The Tax Commissioner shall prescribe by regulation the place for filing any return, declaration, statement or other document required pursuant hereto and for the payment of any tax.

Sec. 69. (1) Every resident and nonresident individual, corporation and other entity taxed as a corporation under the Internal Revenue Code shall make a declaration of the estimated tax for the taxable year, in such form as the Tax

Commissioner may prescribe; *Provided,* that no declaration is required by an individual if the estimated tax can reasonably be expected to be less than forty dollars.

(2) (a) Estimated tax for an individual shall mean the amount which the individual estimates to be his income tax under the provisions of this act for the taxable year less the amount which he estimates to be the sum of any credits allowable for tax withheld.

(b) Estimated tax for a corporation or other entity taxed as a corporation under the Internal Revenue Code shall mean the amount which the corporation or business estimates to be its income tax under the provisions of this act for the taxable year in excess of five thousand dollars, computed as prescribed by the laws of the United States for estimating federal income tax and apportioned to Nebraska in the same manner as taxable income is so apportioned.

(3) If they are eligible to do so for federal tax purposes, a husband and wife may make a joint declaration of estimated tax as if they were one taxpayer, in which case the liability with respect to the estimated tax shall be joint and several. If a joint declaration is made but husband and wife elect to determine their taxes separately, the estimated tax for such year may be treated as the estimated tax of either husband or wife, or may be divided between them, as they may elect.

(4) An individual may amend a declaration under regulations prescribed by the Tax Commissioner.

(5) The declaration of estimated tax for an individual under a disability shall be made and filed in the manner provided in subsection (2) of section 63 of this act for an income tax return.

(6) The declaration and payment of estimated tax shall be filed or paid, as the case may be, on or before the dates prescribed by the laws of the United States for filing declarations and payment of estimated federal income tax, except that the Tax Commissioner, by rule and regulation, may establish other dates for filing declarations and payment of estimated tax.

(7) The application of the provisions of this section to taxable years of less than twelve months shall be in accordance with regulations prescribed by the Tax Commissioner.

(8) Payment of the estimated income tax or any installment thereof, shall be considered payment on account of the income tax imposed under the provisions of this act for the taxable year.

Sec. 70. (1) The Tax Commissioner may grant a reasonable extension of time for payment of income tax or estimated tax or any installment thereof, or for filing any return, declaration, statement, or other document required, on such terms and conditions as he may require; *Provided*, that an extension of time for filing any such return, declaration, statement, or other document granted by the Internal Revenue Service shall operate as an extension hereunder.

(2) If any extension of time is granted for payment of any amount of tax, the Tax Commissioner may require the taxpayer to furnish a bond or other security in an amount not exceeding twice the amount of the tax for which the extension of time for payment is granted, on such terms and conditions as the Tax Commissioner may require, unless the taxpayer shall file a tentative return and pay in accordance therewith any tax or installment due.

Sec. 71. (1) Any return, declaration, statement or other document required to be made pursuant to the income tax provisions of this act shall be signed in accordance with regulations or instructions prescribed by the Tax Commissioner. The fact that an individual's name is signed to a return, declaration, statement or other document, shall be prima facie evidence for all purposes that the return, declaration, statement or other document was actually signed by him, and that said individual was authorized to sign the return, declaration, statement or other document.

(2) The making or filing of any return, declaration, statement, or other document or copy of a federal return, shall constitute a certification by the person making or filing such return, declaration, statement or other document or

copy thereof that the statements contained therein are true and that any copy filed is a true copy.

Sec. 72. The Tax Commissioner may prescribe regulations as to the keeping of records, the content and form of returns and statements and the filing of copies of federal income returns and determinations. The Tax Commissioner may require by regulation or notice, the making of such returns, rendering of such statements, or keeping of such records, as the Tax Commissioner may deem sufficient to show whether or not there is liability for tax or for the collection of tax.

Sec. 73. Every partnership having a resident partner or having any income derived from sources in this state, determined in accordance with the applicable rules of section 33 of this act as in the case of a nonresident individual, shall make a return for the taxable year setting forth all items of income, gain, loss and deduction, and the names and addresses of the individuals whether residents or nonresidents who would be entitled to share in the net income if distributed and the amount of the distributive share of each individual and such other pertinent information as the Tax Commissioner may prescribe by regulations and instructions. Such return shall be filed on or before the date prescribed for filing a federal partnership return. For purposes of this section taxable year shall mean a year or period which would be a taxable year of the partnership if it were subject to tax under the provisions of this act.

Sec. 74. The Tax Commissioner may prescribe regulations and instructions requiring returns of information to be made and filed not inconsistent with the information returns required by the laws of the United States.

Sec. 75. If the amount of a taxpayer's federal tax liability reported on his federal income tax return for any taxable year is changed or corrected by the Internal Revenue Service or other competent authority, or as the result of a renegotiation of a contract or subcontract with the United

States, the taxpayer shall report such change or correction in federal tax liability within ninety days after the final determination of such change, correction, or renegotiation and shall concede the accuracy of such determination or state wherein it is erroneous. Any taxpayer filing an amended federal income tax return shall also file within ninety days thereafter an amended income tax return under the provisions of this act, and shall give such information as the Tax Commissioner may require.

Sec. 76. (1) As soon as practical after an income tax return is filed, the Tax Commissioner shall examine it to determine the correct amount of tax. If the Tax Commissioner finds that the amount of tax shown on the return is less than the correct amount, he shall notify the taxpayer of the amount of the deficiency proposed to be assessed. If the Tax Commissioner finds that the tax paid is more than the correct amount, he shall credit the overpayment against any taxes due by the taxpayer and refund the difference. The Tax Commissioner shall, upon request, make prompt assessment of taxes due as provided by the laws of the United States for federal income tax purposes.

(2) If the taxpayer fails to file an income tax return, the Tax Commissioner shall estimate the taxpayer's tax liability from any available information and notify the taxpayer of the amount proposed to be assessed as in the case of a deficiency.

(3) A notice of deficiency shall set forth the reason for the proposed assessment. The notice may be mailed by certified or registered mail to the taxpayer at his last-known address. In the case of a joint return, the notice of deficiency may be a single joint notice except that if the Tax Commissioner is notified by either spouse that separate residences have been established, he shall mail joint notices to each spouse. If the taxpayer is deceased or under a legal disability, a notice of deficiency may be mailed to his last-known address unless the Tax Commissioner has received notice of the existence of a fiduciary relationship with respect to such taxpayer.

Sec. 77. Ninety days after the date on which it was mailed, or one hundred fifty days if the taxpayer is outside the United States, a notice of proposed assessment of a deficiency shall constitute a final assessment of the amount of tax specified together with interest, additions to tax and penalties except only for such amounts as to which the taxpayer has filed a protest with the Tax Commissioner.

Sec. 78. Within ninety days, or one hundred fifty days if the taxpayer is outside the United States, after the mailing of a deficiency notice, the taxpayer may file with the Tax Commissioner a written protest against the proposed assessment in which he shall set forth the grounds on which the protest is based. If a protest is filed, the Tax Commissioner shall reconsider the assessment of the deficiency and, if the taxpayer has so requested, shall grant the taxpayer or his authorized representative an oral hearing.

Sec. 79. Notice of the Tax Commissioner's determination shall be mailed to the taxpayer by certified or registered mail and such notice shall set forth briefly the Tax Commissioner's findings of fact and the basis of decision in each case decided in whole or in part adversely to the taxpayer.

Sec. 80. The action of the Tax Commissioner on the taxpayer's protest is final upon the expiration of ninety days from the date when he mails notice of his action to the taxpayer unless within this period the taxpayer seeks review of the Tax Commissioner's determination as provided in this act.

Sec. 81. In any proceeding before the Tax Commissioner the burden of proof shall be on the taxpayer except for the following issues, as to which the burden of proof shall be on the Tax Commissioner:

(1) Whether the taxpayer has been guilty of fraud with attempt to evade tax;

(2) Whether the petitioner is liable as the transferee of property of a taxpayer, but not to show that the taxpayer was liable for the tax; or

(3) Whether the taxpayer is liable for any increase in a deficiency where such increase is asserted initially after the notice of deficiency was mailed and a protest under the provisions of section 78 of this act filed, unless such increase in deficiency is the result of a change or correction of federal taxable income required to be reported under the provisions of section 75 of this act, and of which change or correction the Tax Commissioner had no notice at the time he mailed the notice of deficiency.

Sec. 82. Evidence of a federal determination relating to issues raised in a proceeding under the provisions of section 78 of this act shall be admissible, under rules established by the Tax Commissioner.

Sec. 83. In the event that the amount of tax is understated on the taxpayer's return as a result of a mathematical error, the Tax Commissioner shall notify the taxpayer that an amount of tax in excess of that shown on the return is due and has been assessed and the reasons therefor. Such a notice of additional tax due shall not be considered a notice of deficiency assessment nor shall the taxpayer have any right of protest or appeal as in the case of a deficiency assessment based on such notice, and the assessment and collection of the amount of tax erroneously omitted in the return is not prohibited.

Sec. 84. The taxpayer at any time, whether or not a notice of deficiency has been issued, shall have the right to waive the restrictions on assessment and collection of the whole or any part of the deficiency by a signed notice in writing filed with the Tax Commissioner.

Sec. 85. (1) The amount of income tax which is shown to be due on an income tax return, including revisions for mathematical errors, shall be deemed to be assessed on the date of filing of the return including any amended returns showing an increase of tax. In the case of a return properly filed without the computation of the tax, the tax computed by the Tax Commissioner shall be deemed to be assessed on

the date when payment is due. If a notice of deficiency has been mailed, the amount of the deficiency shall be deemed to be assessed on the date provided in section 77 of this act if no protest is filed; or, if a protest is filed, then upon the date when the determination of the Tax Commissioner becomes final. If an amended return or report filed pursuant to the provisions of section 75 of this act concedes the accuracy of a federal change or correction, any deficiency in the income tax under this act resulting therefrom shall be deemed to be assessed on the date of filing such report or amended return and such assessment shall be timely notwithstanding any other provisions of this act. Any amount paid as a tax or in respect of a tax, other than amounts withheld at the source or paid as estimated income tax, shall be deemed to be assessed upon the date of receipt of payment notwithstanding any other provision of this act.

(2) If the mode or time for the assessment of income tax under the provisions of this act, including interest, additions to tax and penalties is not otherwise provided for, the Tax Commissioner may establish the same by regulation.

(3) The Tax Commissioner may, at any time within the period prescribed for assessment, make a supplemental assessment, subject to the provisions of section 76 of this act where applicable, whenever it is found that any assessment is imperfect or incomplete in any material aspect.

Sec. 86. (1) Except as otherwise provided in this act, a notice of a proposed deficiency assessment shall be mailed to the taxpayer within three years after the return was filed. No deficiency shall be assessed or collected with respect to the year for which the return was filed unless a notice of a proposed deficiency assessment shall have been mailed within three years after the return was filed or the period otherwise fixed.

(2) If the taxpayer omits from gross income an amount properly includible therein which is in excess of twenty-five per cent of the amount of gross income stated in the return, a notice of a proposed deficiency assessment may be mailed to the taxpayer within six years after the return was filed.

For purposes of this subsection, there shall not be taken into account any amount which is omitted in the return if such amount is disclosed in the return, or in a statement attached to the return, in a manner adequate to apprise the Tax Commissioner of the nature and amount of such item.

(3) If no return is filed or a false and fraudulent return is filed with intent to evade the income tax imposed by this act, a notice of deficiency may be mailed to the taxpayer at any time.

(4) If a taxpayer fails to comply with the requirement of section 75 of this act by not reporting a change or correction increasing his federal tax liability, or in not reporting a change or correction which is treated in the same manner as if it were a deficiency for federal income tax purposes, or in not filing an amended return, a notice of deficiency may be mailed to the taxpayer at any time.

(5) If the taxpayer shall, pursuant to the provisions of section 75 of this act, report a change or correction or file an amended return increasing his federal tax liability or report a change or correction which is treated in the same manner as if it were a deficiency for federal income tax purposes, the assessment, if not deemed to have been made upon the filing of the report or amended return, may be made at any time within two years after such report or amended return was filed.

(6) Where, before the expiration of the time prescribed in this section for the assessment of a deficiency, both the Tax Commissioner and the taxpayer shall have consented in writing to its assessment after such time, the deficiency may be assessed at any time prior to the expiration of the period agreed upon. The period so agreed may be extended by subsequent agreement in writing made before the expiration of the period previously agreed upon.

An agreement between the taxpayer and the Internal Revenue Service providing for the extension of the period for assessment of federal income taxes shall constitute an agreement with the Tax Commissioner to extend the period for assessment of income taxes under the provisions of this

act. A copy of all such agreements and extensions thereof shall be filed with the Tax Commissioner within thirty days after their execution.

(7) For purposes of this section an income tax return filed before the last day prescribed by this act for the filing thereof, shall be deemed to be filed on such last day. If a return or withholding tax for any period ending with or within a calendar year is filed before April 15 of the succeeding calendar year, such return shall be deemed to be filed on April 15 of such succeeding calendar year.

Sec. 87. An erroneous refund shall be considered an underpayment of tax on the date made, and an assessment of a deficiency arising out of an erroneous refund may be made at any time within two years from the making of the refund, except that the assessment may be made within five years from the making of the refund if it appears that any part of the refund was induced by fraud or the misrepresentation of a material fact.

Sec. 88. (1) If any amount of income tax imposed by the provisions of this act, including tax withheld by an employer, is not paid on or before the last date prescribed for payment, interest on such amount at the rate of six per cent per annum shall be paid for the period from such last date to the date paid.

(2) For purposes of this section, the last date prescribed for the payment of tax shall be determined without regard to any extension of time.

(3) If the taxpayer has filed a waiver of restrictions on the assessment of a deficiency and if notice and demand by the Tax Commissioner for payment of such deficiency is not made within thirty days after the filing of such waiver, interest shall not be imposed on such deficiency for the period beginning immediately after such thirtieth day and ending with the date of notice and demand.

(4) Interest prescribed under this section on any income tax including tax withheld by an employer shall be paid on

notice and demand and shall be assessed, collected and paid in the same manner as income taxes. Any reference to the income tax imposed by the provisions of this act shall be deemed also to refer to interest imposed by this section on such tax.

(5) Interest shall be imposed under this section in respect to any penalty or addition to tax only if such penalty or addition to tax is not paid within ten days of the notice and demand therefor, and in such case interest shall be imposed only for the period from the date of the notice and demand to the date of payment.

(6) If notice and demand is made for the payment of any amount of tax and if such amount is paid within ten days after the date of such notice and demand, interest under the provisions of this section on the amount so paid shall not be imposed for the period after the date of such notice and demand.

(7) If any portion of income tax is satisfied by credit of an overpayment, then no interest shall be imposed under the provisions of this section on the portion of the tax so satisfied for any period during which, if the credit had not been made, interest would have been allowable with respect to such overpayment.

(8) Any portion of the income tax imposed by this act or any interest, penalty, or addition to said tax which has been erroneously refunded and which is recoverable by the Tax Commissioner shall bear interest at the rate of six per cent per annum from the date of payment of the refund.

(9) Interest prescribed under this section may be assessed and collected at any time during the period within which the tax, penalty, or addition to tax to which such interest relates may be assessed and collected respectively.

Sec. 89. (1) In case of failure to file any income tax return required under the provisions of this act on the date prescribed therefor, determined with regard to any extension of time for filing, unless it is shown that such failure is the result of reasonable cause and not the result of willful

neglect, the Tax Commissioner may add to the amount required to be shown as tax on such return, five per cent of the amount of such tax if the failure is for not more than one month, with an additional five per cent for each additional month or fraction thereof during which such failure continues, not exceeding twenty-five per cent in the aggregate. For purposes of this section, the amount of tax required to be shown on the return shall be reduced by the amount of any part of the tax which is paid on or before the date prescribed for payment of the tax and by the amount of any credit against the tax which may be claimed upon the return. For purposes of this section, the amount of tax required to be shown on the return shall be reduced by the amount of any part of the tax which is paid on or before the date prescribed for payment of the tax and by the amount of any credit against the tax which may be claimed upon the return.

(2) In case of each failure to file a statement of payment to another person, including the duplicate statement of tax withheld on wages, on the date prescribed therefor, determined with regard to any extension of time for filing, unless it is shown that such failure is the result of reasonable cause and not willful neglect, the Tax Commissioner may assess a penalty against the person so failing to file the statement, in the amount of two dollars for each statement not so filed but the total amount imposed on the delinquent person for all such failure during any calendar year shall not exceed two thousand dollars.

Sec. 90. (1) If any part of a deficiency is the result of negligence or intentional disregard of rules and regulations, but without intent to defraud, the Tax Commissioner may add to the tax an amount equal to five per cent of the deficiency.

(2) If any part of a deficiency is the result of fraud, the Tax Commissioner may add to the tax an amount equal to fifty per cent of the deficiency. This amount shall be in lieu of any amount determined under subsection (1) of this section.

(3) If any taxpayer fails to file a declaration of estimated tax when required under this act, or fails to pay all or any part of an installment of any tax due, he shall be deemed to have made an underpayment of estimated tax. The Tax Commissioner shall determine the amount of underpayment of estimated tax in accordance with the laws of the United States.

(4) If any employer, without intent to evade or defeat any income tax imposed by this act or the payment thereof, shall fail to make a return and pay a tax withheld by him at the time required by or under the provisions of this act, such employer shall be liable for such taxes and shall pay the same together with interest thereon and any addition to tax assessed pursuant to subsection (1) of this section. Such interest and addition to tax shall not be charged to or collected from the employee by the employer. The Tax Commissioner shall have the same rights and powers for the collection of such tax, interest, and addition to tax against such employer as are now prescribed by this act for the collection of income tax against a taxpayer.

(5) If any person required to collect, truthfully account for, and pay over the income tax imposed by this act willfully fails to collect such tax or truthfully account for and pay over such tax or willfully attempts in any manner to evade or defeat the tax or the payment thereof, the Tax Commissioner may, in addition to other penalties provided by law, impose, assess and collect a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over. No addition to tax under subsection (1) or (2) of this section shall be imposed for any offense to which this subsection applies.

(6) If any person with fraudulent intent shall fail to pay, or to deduct or withhold and pay, any income tax, or to make, render, sign, or certify any return or declaration of estimated tax, or to supply any information within the time required, the Tax Commissioner may impose, assess, and collect a penalty of not more than one thousand dollars, in addition to any other amounts required under the income tax provisions of this act.

(7) The additions to the income tax and penalties relating thereto provided by the provisions of this act shall be paid upon notice and demand and shall be assessed, collected, and paid in the same manner as taxes and any reference in this act to income tax or the tax imposed by the provisions of this act shall be deemed also to refer to additions to the tax and penalties provided by this section. For purposes of the deficiency procedures provided in section 76 of this act, this subsection shall not apply to:

(a) Any addition to tax under subsection (1) of section 89 of this act, except as to that portion attributable to a deficiency;

(b) Any addition to tax for failure to file a declaration or underpayment of estimated tax as provided in subsection (3) of this section; or

(c) Any additional penalty under subsection (6) of this section.

(8) For purposes of subsections (1) and (2) of this section relating to deficiencies resulting from negligence or fraud, the amount shown as the tax by the taxpayer upon his return shall be taken into account in determining the amount of the deficiency only if such return was filed on or before the last day prescribed for the filing of such return, determined with regard to any extension of time for such filing.

(9) For purposes of subsections (5) and (6) of this section the term person shall include an individual, corporation or partnership, or an officer or employee of any corporation, including a dissolved corporation, or a member or employee of any partnership, who as such officer, employee or member is under a duty to perform the act in respect of which the violation occurs.

Sec. 91. (1) The Tax Commissioner, within the applicable period of limitations, may credit an overpayment of income tax and interest on such overpayment against any liability in respect of any tax imposed by the tax laws of this state on the person who made the overpayment, and the

balance shall be refunded by the State Treasurer out of the Tax Refund Fund provided for in section 132 of this act.

(2) If the amount allowable as a credit for income tax withheld from the taxpayer exceeds his tax to which the credit relates, the excess shall be considered an overpayment.

(3) If there has been an overpayment of tax required to be deducted and withheld under section 53 of this act, refund shall be made to the employer only to the extent that the amount of the overpayment was not deducted and withheld by the employer.

(4) The Tax Commissioner may prescribe regulations providing for the crediting against the estimated income tax for any taxable year of the amount determined to be an overpayment of the income tax for a preceding taxable year.

(5) If any amount of income tax is assessed or collected after the expiration of the period of limitations properly applicable thereto, such amount shall be considered an overpayment.

Sec. 92. (1) The Tax Commissioner is authorized to abate the unpaid portion of the assessment of any income tax or any liability in respect thereof, which (a) is excessive in amount, (b) is assessed after the expiration of the period of limitations properly applicable thereto, or (c) is erroneously or illegally assessed.

(2) No claim for abatement shall be filed by a taxpayer in respect of an assessment of any income tax imposed under the provisions of this act.

(3) The Tax Commissioner is authorized to abate the unpaid portion of the assessment of any tax, or any liability in respect thereof, if he determines under uniform rules prescribed by him that the administration and collection costs involved would not warrant collection of the amount due.

Sec. 93. (1) A claim for credit or refund of an overpayment of any income tax imposed by the provisions of this act shall be filed by the taxpayer within three years from

the time the return was filed or two years from the time the tax was paid, whichever of such periods expires the later; or if no return was filed by the taxpayer, within two years from the time the tax was paid. No credit or refund shall be allowed or made after the expiration of the period of limitation prescribed in this subsection for the filing of a claim for credit or refund, unless a claim for credit or refund is filed by the taxpayer within such period.

(2) If the claim is filed by the taxpayer during the three-year period prescribed in subsection (1) of this section, the amount of the credit or refund shall not exceed the portion of the tax paid within the three years immediately preceding the filing of the claim plus the period of any extension of time for filing the return. If the claim is not filed within such three-year period, but is filed within the two-year period, the amount of the credit or refund shall not exceed the portion of the tax paid during the two years immediately preceding the filing of the claim. If no claim is filed, the credit or refund shall not exceed the amount which would be allowable under either of the preceding sentences, as the case may be, if a claim was filed on the date the credit or refund is allowed.

(3) If an agreement for an extension of the period for assessment of income taxes is made within the period prescribed in subsection (1) of this section for the filing of a claim for credit or refund, the period for filing claim for credit or *for making* credit or refund if no claim is filed, shall not expire prior to six months after the expiration of the period within which an assessment may be made pursuant to the agreement or any extension thereof.

(4) If a taxpayer is required by section 75 of this act to report a change or correction in federal taxable income reported on his federal income tax return, or to report a change or correction which is treated in the same manner as if it were an overpayment for federal income tax purposes, or to file an amended return with the Tax Commissioner, claim for credit or refund of any resulting overpayment of tax shall be filed by the taxpayer within two years from the time the notice of such change or correction or such amended

return was required to be filed with the Tax Commissioner. If the report or amended return required by section 75 of this act is not filed within the ninety-day period therein specified, interest on any resulting refund or credit shall cease to accrue after such ninetieth day. The amount of such credit or refund shall not exceed the amount of the reduction in tax attributable to such federal change, correction, or items amended on the taxpayer's amended federal income tax return. This subsection shall not affect the time within which or the amount for which a claim for credit or refund may be filed apart from this subsection.

(5) If the claim for credit or refund relates to an overpayment attributable to a net operating loss carryback, the claim may be made under regulations prescribed by the Tax Commissioner consistent with the laws of the United States.

Sec. 94. (1) Under regulations prescribed by the Tax Commissioner interest shall be allowed and paid at the rate of six per cent per annum upon any overpayment in respect of the income tax imposed by the provisions of this act.

(2) For purposes of this section:

(a) Any return filed before the last day prescribed for the filing thereof shall be considered as filed on such last day determined without regard to any extension of time granted the taxpayer; and

(b) Any tax paid by the taxpayer before the last day prescribed for its payment, any income tax withheld from the taxpayer during any calendar year and any amount paid by the taxpayer as estimated income tax for a taxable year shall be deemed to have been paid on the last day prescribed for filing the return for the taxable year to which such amount constitutes a credit or payment, determined without regard to any extension of time granted the taxpayer.

(3) If any overpayment of income tax imposed by the provisions of this act is refunded within three months after the last date prescribed, or permitted by extension of time, for filing the return of such tax or within three months

after the return was filed, whichever is later, no interest shall be allowed under the provisions of this section on overpayment.

Sec. 95. Every claim for refund shall be filed with the Tax Commissioner in writing and shall state the specific grounds upon which it is founded. The Tax Commissioner shall grant the taxpayer or his authorized representative an opportunity for an oral hearing if the taxpayer so requests.

Sec. 96. If the Tax Commissioner disallows a claim for refund, he shall notify the taxpayer accordingly. The action of the Tax Commissioner denying a claim for refund is final upon the expiration of ninety days from the date when he mails notice of his action to the taxpayer unless within this period the taxpayer seeks review of the Tax Commissioner's determination as hereinafter provided.

Sec. 97. The Tax Commissioner shall mail a notice of action on any refund claim within six months after the claim is filed. The taxpayer may, prior to notice of action on the refund claim, consider the claim disallowed.

Sec. 98. Except in cases involving the proposed assessment of a deficiency, any taxpayer who claims that the income tax he has paid under this act is void in whole or in part, may bring an action, upon the grounds set forth in his claim for refund, against the Tax Commissioner for recovery of the whole or any part of the amount paid. Such suit against the Tax Commissioner may be instituted in a district court of Nebraska of appropriate jurisdiction where the taxpayer resides or in the district court of Lancaster County.

Sec. 99. No suit shall be maintained for the recovery of any income tax imposed by the provisions of this act alleged to have been erroneously paid until a claim for refund has been filed with the Tax Commissioner as provided in section 95 of this act and the Tax Commissioner has denied the refund.

Sec. 100. The action authorized in section 98 of this act shall be filed within three years from the last date pre-

scribed for filing the return or within one year from the date the tax was paid, or within ninety days after the denial of a claim for refund by the Tax Commissioner.

Sec. 101. In any action for a refund, the court may render judgment for the taxpayer for any part of the tax, interest, penalties, or other amounts found to be erroneously paid, together with interest on the amount of the overpayment. The amount of any judgment against the Tax Commissioner shall first be credited against any taxes, interest, penalties, or other amounts due from the taxpayer under the tax laws of Nebraska and the remainder refunded.

Sec. 102. (1) The income tax imposed by this act shall be collected by the Tax Commissioner and he may establish the mode or time for the collection of any amount due under the provisions of this act if not otherwise specified. The Tax Commissioner shall, upon request, give a receipt for any income tax collected under this act. The Tax Commissioner may authorize incorporated banks or trust companies which are depositaries or fiscal agents of this state to receive and give a receipt for any income tax imposed under the provisions of this act, in such manner, at such times, and under such conditions as he may prescribe; and the Tax Commissioner shall prescribe the manner, times, and conditions under which the receipt of tax by such banks and trust companies is to be treated as payment of tax to the Tax Commissioner.

(2) The Tax Commissioner shall as soon as practicable give notice to each person liable for any amount of tax, addition to tax, additional amount, penalty or interest, which has been assessed but remains unpaid, stating the amount and demanding payment thereof within sixty days of the date of the notice. Such notice shall be left at the dwelling place or usual place of business of such person or shall be sent by mail to such person's last-known address.

Sec. 103. Any (1) tax due and unpaid under the provisions of this act, (2) interest, penalty, or addition to such tax, (3) tax, interest, penalty, or addition to such tax which has

been erroneously refunded, and (4) deficiency shall constitute a debt to the State of Nebraska which may be collected by lien foreclosure or sued for and recovered in any proper form of action, in the name of the State of Nebraska, in the district court of the county wherein the taxpayer resides or owns property.

Sec. 104. (1) If any person liable to pay any tax neglects or refuses to pay the same within sixty days after notice and demand, the amount of such tax, including any interest, penalty, or addition to such tax, together with any costs that may accrue in addition thereto, shall be a lien in favor of the State of Nebraska upon all real property and rights to real property in this state belonging to such person.

(2) Such lien shall not be valid as against any mortgagee or other lienholder, pledgee, purchaser, or judgment creditor until notice thereof has been filed in the office of the register of deeds of any county in which the property subject to lien is situated as provided in subsection (1) of section 105 of this act.

Sec. 105. (1) If any income tax, including any interest, penalty, or addition to such tax, and any tax or any interest, penalty, or addition to such tax which has been erroneously refunded, imposed by this act is not paid when due, the commissioner may within three years after the tax is due, file for record in the office of the register of deeds of any county in which property belonging to the taxpayer is situated a notice of lien specifying the year and the amount of the tax, interest, penalty, additional amount, or addition to such tax due. Such notice shall contain the name and last-known address of the taxpayer, an identification number, and a statement to the effect that the Tax Commissioner complied with all the provisions of this act in the determination of the amount required to be paid. From the time of filing for record, the amount set forth in such notice shall constitute a lien upon all real property and rights to real property in the county then owned by the taxpayer, and upon all real property and rights to real property acquired by him thereafter and before the lien expires.

(2) The lien may, within five years from the date of filing for record of the notice of lien, be extended by filing for record a new notice. From the time of such filing the lien shall be extended for five years, unless fully released or otherwise discharged.

(3) When a notice of such lien is filed, the appropriate county official shall enter the same in an alphabetical state tax lien index, showing on one line the name and residence of the taxpayer named in such notice, the Tax Commissioner's serial number of such notice, the date and hour of filing, and the amount due. All original notices shall be retained in numerical order in a file designated state tax lien notices.

(4) When a certificate of discharge of any income tax lien issued by the Tax Commissioner is filed in the office where the original notice of lien is filed, the appropriate county official shall enter the same with the date of filing in the state tax lien index on the line where notice of the lien so discharged is entered, and shall permanently attach the original certificate of discharge to the original notice of lien.

(5) The Tax Commissioner may at any time release from a lien all or any portion of the property subject thereto, or he may subordinate the lien if he determines (a) that the taxes, penalties, additions, or interest are sufficiently secured by a lien on other property of the taxpayer, (b) that the release or subordination of the lien will not endanger or jeopardize the collection of such taxes, penalties, additions, or interest, (c) that a surety bond or securities satisfactory to secure deposits of public funds has been posted, deposited, or pledged with the Tax Commissioner in an amount sufficient to secure the payment of such taxes, penalties, additions, or interest, or (d) all or a part of such taxes, penalties, additions, or interest have been paid. A certificate by the Tax Commissioner to the effect that any property has been released from a lien, or that such lien has been subordinated, shall be conclusive evidence that such action has been taken.

(6) In any case where there has been a refusal or neglect to pay any income tax, including interest, penalty, or

addition to such tax, together with any costs that may accrue in addition thereto, the Tax Commissioner may file an action in the district court of the county in which such lien is filed to enforce the lien upon any real property and rights to real property or to subject any such property and rights to property owned by the delinquent, or in which he has any right, title, or interest, to the payment of such tax. Such action shall be commenced and pursued in like manner as is provided for the foreclosure of mortgages. Such action may be commenced at any time within five years following the date such lien arose or was last extended.

Sec. 106. (1) In addition to all other remedies or actions provided by this act, it shall be lawful for the Tax Commissioner to collect any income taxes due together with interest, penalties, and additions to such tax, by distraint and sale of the personal property of any taxpayer who neglects or refuses to pay the same within sixty days from the mailing of notice and demand for payment thereof, and who has not appealed from the assessment of such taxes, interest, penalties, and additions pursuant to the income tax provisions of this act, or who has not satisfied or discharged any lien filed.

(2) Property exempt from distraint shall be the same property as is exempt from execution under the laws of this state.

(3) In case of neglect or refusal to pay taxes or deficiencies as provided, the Tax Commissioner may levy or, by warrant issued under his own hand, authorize a sheriff, constable, or deputy commissioner to levy upon, seize, and sell all personal property, except such as is exempt, belonging to such person, for the payment of the amount due.

(4) (a) When a warrant is issued by the Tax Commissioner for the collection of any income tax, interest, penalty, or addition to such tax imposed by the provisions of this act, or for the enforcement of any income tax lien authorized by this act, it shall have the same force and effect as a levy and sale pursuant to a writ of execution. (b) Such warrant may be levied and sale made pursuant to it in the same manner

and with the same force and effect as a levy and sale pursuant to a writ of execution. (c) The Tax Commissioner shall pay the levying sheriff, constable, or deputy commissioner the same fees, commissions and expenses pursuant to such warrant as are provided by law for similar services pursuant to a writ of execution, except that fees for publication in a newspaper shall be subject to approval by the Tax Commissioner rather than by the court. Such fees, commissions, and expenses shall be an obligation of the taxpayer and may be collected from the taxpayer by virtue of the warrant. (d) Any such warrant shall show the name and last-known address of the taxpayer, the year for which such tax, interest, penalty, or addition to such tax is due and the amount thereof, and the fact that the Tax Commissioner has complied with all provisions of this act in the determination of the amount required to be paid, and that the tax, interest, penalty, or addition to such tax is due and payable according to law.

(5) Whenever any property which is seized and sold under the provisions of this section is not sufficient to satisfy the claim of the state for which distraint or seizure is made, the sheriff, constable, or deputy commissioner may thereafter, and as often as the same may be necessary, proceed to seize and sell in like manner any other property liable to seizure of the taxpayer against whom such claim exists, until the amount due from such taxpayer, together with all expenses, is fully paid.

(6) All persons and officers of companies or corporations shall, on demand of a sheriff, constable, or deputy commissioner about to distrain, or having distrained any property or rights of property, exhibit all books containing evidence or statements relating to the subject of distraint, or the property or rights of property liable to distraint for the tax due.

(7) The distraint provisions of this section shall not be deemed exclusive, but shall be in addition to any and all other existing remedies provided by law for the enforcement of the income tax provisions of this act.

(8) Nothing in this section shall be construed to prohibit the commencing of any action at law by the Tax Com-

missioner to collect any income tax, interest, penalty, or addition to such tax due under the provision of this act whenever in the opinion of the Tax Commissioner the commencement of such action is a more appropriate method of accomplishing such collection.

Sec. 107. When notice and demand for the payment of income tax is given to a nonresident and it appears to the Tax Commissioner that it is not practicable to locate property of the taxpayer sufficient in amount to cover the amount of tax due, he shall send a copy of the notice provided for in sections 104 and 105 of this act to the taxpayer at his last-known address together with a notice that such notice has been filed with the register of deeds. Thereafter, the Tax Commissioner may authorize the institution of any action or proceeding to collect or enforce such claim in any place and by any procedure that a civil judgment of a court of record of this state could be collected or enforced. The Tax Commissioner may also in his discretion, designate agents or retain counsel outside this state for the purpose of collecting outside this state any income taxes due under this act from taxpayers who are not residents of this state; and he may fix the compensation of such agents and counsel to be paid out of money appropriated or otherwise lawfully available for payment thereof and he may require of them bonds or other security for the faithful performance of their duties. The Tax Commissioner is authorized to enter into agreements with the tax departments of other states and the District of Columbia for the collection of income taxes from persons found in those jurisdictions who are delinquent in the payment of income taxes imposed under the provisions of this act.

Sec. 108. The courts of this state shall recognize and enforce liabilities for income taxes lawfully imposed by any other state which extends a like comity to this state, and the duly authorized office of any such state may sue for the collection of such a tax in the courts of this state. A certificate by the Secretary of State of such other state that an office suing for the collection of such a tax is duly authorized

to collect the tax shall be conclusive proof of such authority. For the purpose of this section, the word taxes shall include additions to tax, interest and penalties. Liability for such taxes, additions to tax, interest and penalties shall be recognized and enforced by the courts of this state to the same extent that the laws of such other state permit the enforcement in its courts of liability for such taxes, additions to tax, interest and penalties due this state under the provisions of this act.

Sec. 109. (1) If any person willfully refuses to file an income tax return required by the provisions of this act, the Tax Commissioner may apply to a judge of the district court for the county in which the person resides, or, in the case of a corporation, the county in which it has its principal place of business in Nebraska, for an order directing such person to file the required return. If such person fails or refuses to obey such order, he shall be guilty of contempt of court.

(2) If any person willfully refuses to make available any books, papers, records or memoranda for examination by the Tax Commissioner or his representative, or willfully refuses to attend and testify, pursuant to the powers conferred on the Tax Commissioner by subsection (3) of section 119 of this act, the Tax Commissioner may apply to a judge of the district court for the county where such person resides, for an order directing such person to comply with the Tax Commissioner's request for books, papers, records or memoranda or for his attendance and testimony. If the books, papers, records or memoranda required by the Tax Commissioner are in the custody of a corporation, the order of the court may be directed to any principal officer of such corporation. If a person fails or refuses to obey such order, he shall be guilty of contempt of court.

Sec. 110. (1) The liability, at law or in equity, of a transferee of property of a taxpayer for any income tax, addition to such tax, penalty or interest due the Tax Commissioner under the provisions of this act, shall be assessed, paid and collected in the same manner and subject to the same provisions and limitations as in the case of the tax to

which the liability relates. Transferee shall include donee, heir, legatee, devisee, distributee, successor, and assignee.

(2) If any person is deceased, the period of limitation for assessment against such person shall be the period that would be in effect had death not occurred.

Sec. 111. (1) If the Tax Commissioner finds that a taxpayer is about to (a) depart from the State of Nebraska, (b) remove his property therefrom, (c) conceal himself or his property therein, or (d) do any other act tending to prejudice or render wholly or partially ineffectual any proceedings to collect the income tax for the preceding or current taxable year unless such proceedings be brought without delay, the Tax Commissioner shall declare the taxable period for such taxpayer immediately terminated, and shall cause notice of such findings and declaration to be given the taxpayer, together with a demand for immediate payment of any income tax due for this period, whether or not the time otherwise allowed by law for filing returns and paying the tax has expired. Such tax shall thereupon become immediately due and payable. In any proceedings in court brought to enforce payment of taxes made due and payable by virtue of the provisions of this section, such findings of the Tax Commissioner, whether made after notice to the taxpayer or not, shall be for all purposes prima facie evidence of the taxpayer's design.

(2) A taxpayer who is not in default in making any income tax return or paying any income taxes assessed under the provisions of this act may furnish to the Tax Commissioner, under regulations to be prescribed by the Tax Commissioner, security that he will duly make the return next thereafter required to be filed and pay the tax next thereafter required to be paid. The Tax Commissioner may approve and accept in like manner security for return and payment of taxes made due and payable by virtue of the provisions of this section.

(3) If security is approved and accepted pursuant to the provisions of subsection (2) of this section and such further or other security with respect to the tax or taxes covered

thereby is given as the Tax Commissioner shall from time to time find necessary and require, payment of such taxes shall not be enforced by any proceedings under the provisions of this section prior to the expiration of the time otherwise allowed for paying such taxes.

(4) In the case of a bona fide resident of Nebraska about to depart from the state the Tax Commissioner may waive any or all of the requirements placed upon the taxpayer by the provisions of this section.

Sec. 112. (1) Upon the adjudication of bankruptcy of any taxpayer in any bankruptcy proceeding or the appointment of a receiver for any taxpayer in any receivership proceeding before any court of the United States or any state or territory or of the District of Columbia, any deficiency, together with additions to tax and interest provided by law, determined by the Tax Commissioner, may be immediately assessed.

(2) Claims for the deficiency and such additions to income tax and interest may be presented, for adjudication in accordance with law, to the court before which the bankruptcy or receivership proceeding is pending, despite the pendency of a protest before the Tax Commissioner under the provisions of section 78 of this act. No protest against a proposed assessment shall be filed with the Tax Commissioner after the adjudication of bankruptcy or appointment of the receiver.

Sec. 113. Any person who willfully attempts in any manner to evade any income tax imposed by the provisions of this act or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and shall, upon conviction thereof, be fined not more than ten thousand dollars, or be imprisoned not more than five years, or be both so fined and imprisoned, together with the costs of prosecution.

Sec. 114. Any person required under the provisions of this act to collect, truthfully account for, and pay over any income tax imposed by the provisions of this act who will-

fully fails to collect or truthfully account for and pay over such tax shall, in addition to other penalties provided by law, be guilty of a felony and shall, upon conviction thereof, be fined not more than ten thousand dollars, or be imprisoned not more than five years, or be both so fined and imprisoned, together with the costs of prosecution.

Sec. 115. Any person required under the provisions of this act to pay any income tax or estimated tax, or required by the provisions of this act or regulation prescribed thereunder to make a return, other than a return of estimated tax, keep any records, or supply any information, who willfully fails to pay such tax or estimated tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and shall, upon conviction thereof, be fined not more than three hundred dollars, or be imprisoned not more than six months, or be both so fined and imprisoned, together with the costs of prosecution.

Sec. 116. Any person who willfully makes and subscribes any return, statement or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; or willfully aids or procures the preparation or presentation in a matter arising under the income tax provisions of this act of a return, affidavit, claim or other document which is fraudulent or is false as to any material matter shall be guilty of a felony and shall, upon conviction thereof, be fined not more than ten thousand dollars, or be imprisoned not more than five years, or be both so fined and imprisoned, together with the costs of prosecution.

Sec. 117. Any prosecution under income tax provisions of this act shall be instituted within three years after the commission of the offense; *Provided,* that if such offense is the failure to do an act required by or under the income tax provisions of this act to be done before a certain date, a prosecution for such offense may be commenced not later

than three years after such date. The failure to do any act required by or under the income tax provisions of this act shall be deemed an act committed in part at the principal office of the Tax Commissioner. Any prosecution may be conducted in any county where the person or corporation to whose liability the proceeding relates resides, or has a place of business or in any county in which such crime is committed. The Attorney General shall have concurrent jurisdiction with the county attorney in the prosecution of offenses.

Sec. 118. Any corporate officer or employee with the duty to pay income taxes imposed upon a corporation or to perform some other act required of a corporation shall be personally liable for the payment of such taxes or penalties in the event of willful failure on his part to perform such act.

Sec. 119. (1) The Tax Commissioner shall administer and enforce the income tax imposed by this act and he is authorized to make such rules and regulations and to require such facts and information to be reported, as he may deem necessary to enforce the income tax provisions of this act; *Provided,* that such rules, regulations and reports shall not be inconsistent with the laws of this state or the laws of the United States. The Tax Commissioner may for enforcement and administrative purposes divide the state into a reasonable number of districts in which branch offices may be maintained.

(2) The Tax Commissioner may prescribe the form and contents of any return or other document required to be filed under the income tax provisions of this act; *Provided,* that such return or other document shall be compatible as to form and content with the return or document required by the laws of the United States.

(3) The Tax Commissioner, for the purpose of ascertaining the correctness of any income tax return, or for the purpose of making an estimate of taxable income of any person, shall have the power to examine or to cause to have examined, by any agent or representative designated by him for that purpose, any books, papers, records or memoranda

bearing upon the matters required to be included in such return, and may, by summons, require the attendance of the person rendering the return or any officer or employee of such person, or the attendance of any other person having knowledge in the premises, and may take testimony and require proof material for his information, with power to administer oaths to such person or persons.

(4) The time and place of examination pursuant to the provisions of this section shall be such time and place as may be fixed by the Tax Commissioner and as are reasonable under the circumstances. In the case of a summons, the date fixed for appearance before the Tax Commissioner shall not be less than twenty days from the time of service of the summons.

(5) No taxpayer shall be subjected to unreasonable or unnecessary examinations or investigations.

(6) Except in accordance with proper judicial order or as otherwise provided by law, it shall be unlawful for the Tax Commissioner, any officer or employee of the Tax Commissioner, any person engaged or retained by the Tax Commissioner on an independent contract basis, or any person who, pursuant to this section, is permitted to inspect any report or return or to whom a copy, an abstract or a portion of any report or return is furnished, to divulge or make known in any manner the amount of income or any particulars set forth or disclosed in any report or return required. The officers charged with the custody of such reports and returns shall not be required to produce any of them or evidence of anything contained in them in any action or proceeding in any court, except on behalf of the Tax Commissioner in an action or proceeding under the provisions of the tax law to which he is a party, or on behalf of any party to any action or proceeding under the provisions of this act when the reports or facts shown thereby are directly involved in such action or proceeding, in either of which events the court may require the production of, and may admit in evidence, so much of said reports or of the facts shown thereby as are pertinent to the action or proceeding and no more. Nothing herein shall be construed (a) to prohibit the deliv-

ery to a taxpayer, his duly authorized representative, or his successors, receivers, trustees, executors, administrators, assignees, and guarantors, if directly interested, of a certified copy of any return or report in connection with his tax, (b) to prohibit the publication of statistics so classified as to prevent the identification of particular reports or returns and the items thereof, or (c) the inspection by the Attorney General or other legal representatives of the state of the report or return of any taxpayer who shall bring an action to review the tax based thereon, or against whom an action or proceeding for collection of tax has been instituted. Any person who violates the provisions of this subsection shall be guilty of a felony and shall, upon conviction thereof, be fined not less than one hundred dollars nor more than five hundred dollars, or be imprisoned not more than five years, or be both so fined and imprisoned, in the discretion of the court, together with costs of prosecution. If the offender is an officer or employee of the state, he shall be dismissed from office and be ineligible to hold any public office in this state for a period of two years thereafter.

(7) Reports and returns required to be filed under income tax provisions of this act shall be preserved for three years and thereafter until the Tax Commissioner orders them to be destroyed.

(8) Notwithstanding the provisions of subsection (6) of this section, the Tax Commissioner may permit the Secretary of the Treasury of the United States or his delegates, or the proper officer of any state imposing an income tax, or the authorized representative of either such officer, to inspect the income tax returns of any taxpayer, or may furnish to such officer or his authorized representative an abstract of the return of income of any taxpayer or supply him with information concerning an item of income contained in any return, or disclosed by the report of any investigation of the income or return of income of any taxpayer but such permission shall be granted only if the statutes of the United States or of such other state, as the case may be, grant substantially similar privileges to the Tax Commissioner of this state as the officer charged with the administration of

the income tax imposed by the provisions of this act.

(9) The Tax Commissioner may permit other tax officials of this state to inspect the tax returns and reports filed under the provisions of this act but such inspection shall be permitted only for purposes of enforcing a tax law and only to the extent and under the conditions prescribed by the regulations of the Tax Commissioner.

Sec. 120. (1) The Tax Commissioner, or any person authorized in writing by him, is authorized to enter into an agreement with any person relating to the liability of such person, or of the person or estate for whom he acts, in respect to the tax imposed by the provisions of this act for any taxable period.

(2) Such agreement shall be final and conclusive, and, except upon a showing of fraud, malfeasance, or misrepresentation of a material fact:

(a) The case shall not be reopened as to matters agreed upon or the agreement modified by any officer, employee or agent of this state; and

(b) In any suit, action or proceeding under such agreement, or any determination, assessment, collection, payment, abatement, refund, or credit made in accordance therewith, shall not be annulled, modified, set aside or disregarded.

Sec. 121. The Governor, with the advice and consent of the Legislature, is authorized to enter into an agreement with the Secretary of the Treasury of the United States or his delegate under which, to the extent provided by the terms of the agreement, the secretary or his delegate will administer, enforce, and collect such income tax on behalf of the state. The cost of the services performed by the secretary or his delegate in administering, enforcing or collecting an income tax under the terms of such an agreement may be paid from the appropriations for the general operations of the Tax Commissioner.

Sec. 122. The Governor, with the advice and consent of the Legislature, is authorized to enter into an agreement with the Secretary of the Treasury of the United States or his

delegate under which, to the extent provided by the terms of the agreement, the Governor or his delegate will undertake to conduct on behalf of the United States any administrative, enforcement or collection function in respect to the federal income tax. Such agreement shall make provision for the payment by the United States of the cost of the services performed on its behalf.

Sec. 123. (1) The period of service in the armed forces of the United States in combat zone plus any period of continuous hospitalization outside this state attributable to such service plus the next one hundred eighty days shall be disregarded in determining, under regulations to be promulgated by the Tax Commissioner, whether any act required by the provisions of this act was performed by a taxpayer or his representative within the time prescribed therefor.

(2) In the case of any individual who dies while in active service as a member of the armed forces of the United States, if such death occurred while the individual was serving in a combat zone or as a result of wounds, disease, or injury incurred while so serving, the income tax imposed by the provisions of this act shall not apply with respect to the taxable year in which falls the date of his death, or with respect to any prior taxable year ending on or after the first day he so served in a combat zone.

Sec. 124. This act shall take effect immediately and shall be applicable with respect to items of income, deduction, loss or gain accruing in taxable years ending on or after January 1, 1968, but only to the extent such items have been earned, received, incurred or accrued on or after January 1, 1968. For the purpose of facilitating the administration of the tax imposed by the provisions of this act during the transitional period, the Tax Commissioner shall provide by regulation for the filing of returns in respect to taxable periods of less than twelve calendar months ending after January 1, 1968, and prior to December 31, 1968.

(c) General Provisions

Sec. 125. If any tax, report, claim, statement, notice,

petition, or other document including, to the extent authorized by the Tax Commissioner, a return or declaration of estimated tax, required to be filed within a prescribed period or on or before a prescribed date under the authority of any provision of this act is, after such period or such date, delivered by United States mail to the Tax Commissioner, or the officer or person with which or with whom such document is required to be filed, the date of the United States postmark stamped on the envelope shall be deemed to be the date of delivery. This section shall apply only if the postmark date falls within the prescribed period or on or before the prescribed date for the filing of such document, determined with regard to any extension granted for such filing, and only if such document was deposited in the mail, postage prepaid, properly addressed to the Tax Commissioner. If any document is sent by United States registered mail, such registration shall be prima facie evidence that such document was delivered to the Tax Commissioner. To the extent that the Tax Commissioner shall prescribe by regulation, certified mail may be used in lieu of registered mail under this section. The provisions of this section shall apply in the case of postmarks not made by the United States post office only if and to the extent provided by regulations of the Tax Commissioner. When the last day prescribed under the authority of this act, including any extension of time, for performing any act falls on Saturday, Sunday, or a day considered a holiday by the Tax Commissioner's office, the performance of such act shall be considered timely if it is performed on the next succeeding day which is not a Saturday, Sunday, or a day considered a holiday by the Tax Commissioner's office. The Tax Commissioner shall, upon request, give a receipt for any document filed under the provisions of this act.

Sec. 126. An appeal may be taken to the State Board of Equalization and Assessment from any finding, ruling, order, decision, determination or other final action of the Tax Commissioner by any person aggrieved thereby. Notice of such appeal shall be filed with the secretary of the board within thirty days after the date of mailing notice of the Tax Commissioner's action to the person aggrieved. All matters pre-

sented to the board shall be heard and determined without delay. All matters requiring a hearing shall be set for hearing at the earliest practicable date and in no event, except for good cause shown, which showing shall be made a part of the record, shall the time fixed for hearing be more than ninety days after the time of filing the notice of appeal. The decision of the board shall be made and filed within thirty days after the completion of the hearing. Proceedings before the board except as otherwise provided herein shall be governed by the provisions of sections 84-901 to 84-916, Reissue Revised Statutes of Nebraska, 1943.

Sec. 127. Any final decision of the State Board of Equalization and Assessment shall be subject to judicial review as provided in sections 84-917 to 84-919, Reissue Revised Statutes of Nebraska, 1943. Any final action of the Tax Commissioner, if the person aggrieved thereby elects not to appeal first to the State Board of Equalization and Assessment, shall be subject to judicial review as provided in sections 84-917 to 84-919, Reissue Revised Statutes of Nebraska, 1943, as though it were a final decision of the State Board of Equalization and Assessment. The review provided by this section shall be the exclusive remedy available to any taxpayer and no other legal or equitable proceedings shall issue to prevent or enjoin the assessment or collection of any tax imposed under the provisions of this act.

Sec. 128. The review provided by sections 126 and 127 of this act shall be the exclusive remedies available to any taxpayer for the review of the action in respect to the assessment of a proposed deficiency. No injunction or other legal or equitable process shall issue in any suit, action or proceeding in any court against this state or against any office of this state to prevent or enjoin the assessment or collection of any tax imposed under the provisions of this act.

Sec. 129. The Tax Commissioner may collect a deficiency notwithstanding that an application for review in respect of such deficiency has been made by the taxpayer, unless the taxpayer at or before the time his application for

review is made, has paid the deficiency, or has deposited with the Tax Commissioner the amount of the deficiency or has filed with the Tax Commissioner a bond, in the amount of the deficiency being contested including interest and other amounts as well as all costs and charges which may accrue against him in the prosecution of the proceeding and issued by a person authorized under the laws of this state to act as surety, conditioned upon the payment of the deficiency including interest and other amounts as finally determined and such costs and charges.

Sec. 130. (1) If the amount of a deficiency determined by the Tax Commissioner is disallowed in whole or in part by the court of review, the amount so disallowed shall be credited or refunded to the taxpayer without the making of a claim therefor, or, if payment has not been made, shall be abated.

(2) If the deficiency determined by the Tax Commissioner is disallowed by the court of review, the taxpayer shall have his costs as they would be allowable under the provisions of section 129 of this act. If the deficiency is disallowed in part, the court in its discretion may award the taxpayer a proportionate part of his costs.

(3) An assessment of a proposed income deficiency by the Tax Commissioner shall become final upon the expiration of the period specified in section 77 of this act for filing a written protest against the proposed assessment if no such protest has been filed within the time provided; or if the protest provided in section 78 of this act has been filed, upon the expiration of time provided for filing a petition for judicial review, or upon the final judgment of the reviewing court or upon the rendering by the Tax Commissioner of a decision pursuant to the mandate of the reviewing court. Notwithstanding the foregoing, for the purpose of making a petition for the review of a determination of the Tax Commissioner, the determination shall be deemed final on the date the notice of decision is sent by certified mail or registered mail to the taxpayer as provided in section 79 of this act.

Sec. 131. (1) Unless otherwise specifically provided, the Tax Commissioner, whenever he deems it necessary to insure compliance with the provisions of this act, may require any person subject to the provisions of this act to place with him such security as he may determine. The amount of the necessary security shall be fixed by the Tax Commissioner but, except as provided in this section, shall not be greater than three times the estimated average monthly amount payable by such persons pursuant to the provisions of this act or ten thousand dollars, whichever amount is the lesser. In the case of persons habitually delinquent in their obligations under the provisions of this act, the amount of the security shall not be greater than five times the estimated average monthly amount payable by such persons pursuant to this act or fifteen thousand dollars, whichever is the lesser. The amount of the security may be increased or decreased by the Tax Commissioner at any time, subject to the limitations set forth in this subsection.

(2) The Tax Commissioner may sell the security at public auction or, in the case of security in the form of bearer bonds issued by the United States or this state which have a prevailing market price, at a private sale at a price not lower than the prevailing market price if it becomes necessary to make such sale in order to recover any tax, interest, or penalties due on any amount required to be collected. Notice of the sale must be given to the person who deposited the security at least ten days before the sale; such notice may be given personally or by mail addressed to the person at the address furnished to the Tax Commissioner and as it appears in the records of the Tax Commissioner. Upon such sale, any surplus above the amounts due shall be returned to the person who placed the security.

Sec. 132. (1) There is hereby created a fund to be designated Tax Refund Fund which shall be set apart and maintained by the State Treasurer for prompt payments of all tax refunds under the provisions of this act. Such fund shall be in such amount as the Tax Commissioner shall determine is necessary to meet current refunding requirements under the provisions of this act.

(2) The Tax Commissioner shall pay to the State Treasurer all amounts collected under the provisions of this act. From the amounts so paid the State Treasurer shall first credit to the Tax Refund Fund such amounts as are necessary to maintain such Tax Refund Fund at the level required by subsection (1) of this section. The balance of the amounts so paid shall be credited to the General Fund.

Sec. 133. Unless otherwise specifically provided for in this act, a deficiency assessed against a person not within this state may be prosecuted by an action in any court in this state having jurisdiction of the subject matter, and the court shall have in personam jurisdiction of such person in any such action for taxes imposed and assessed under the provisions of this act. Notice shall be given such person by personal service without the state or by publication, and the action shall proceed in accordance with the statutes regulating procedure in this state. If such notice shall be by publication, notice shall also be mailed by registered or certified mail to such person at his last-known address.

Sec. 134. Unless specifically provided for in this act, after any period of limitations fixed by this act, the Tax Commissioner may destroy obsolete returns.

Sec. 135. Whenever any notice required to be given by the Tax Commissioner under the provisions of this act may be given by mail, it shall be given by either registered or certified mail, return receipt requested, and not otherwise.

Sec. 136. If any section, subsection, sentence, clause, or phrase of this act is for any reason held to be unconstitutional or invalid, such decision shall not affect the validity of the remaining portions of this act.

Sec. 137. Since an emergency exists, this act shall be in full force and take effect, from and after its passage and approval, according to law.

Approved April 12, 1967.

SUPREME COURT, U. S.

FILED
APR 9 1968
JOHN F. DAVIS, CLERK

In The

Supreme Court of the United States

No. 1218

PHILIP C. ANDERSON, et al., APPELLANTS

V.

NORBERT TIEMANN, et al., APPELLEES

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF NEBRASKA

MOTION TO AFFIRM

CLARENCE A. H. MEYER,
Attorney General
GERALD S. VITAMVAS,
Deputy Attorney General
RICHARD H. WILLIAMS,
Special Assistant Attorney General
Room 2119 State Capitol Building
Lincoln, Nebraska 68509
Attorneys for Appellees

JOE CHRISTENSEN, INC., 1821 O Street, Lincoln, Nebraska

In The

Supreme Court of the United States

No. ———

PHILIP C. ANDERSON, et al., APPELLANTS

V.

NORBERT TIEMANN, et al., APPELLEES

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF NEBRASKA

MOTION TO AFFIRM

COME NOW the appellees and move this Court to affirm the judgment of the Supreme Court of Nebraska, sought to be reviewed on appeal herein, on the ground that it is manifest from the opinion of the Nebraska Court that the federal questions there considered were carefully and correctly decided and there is no indication of need for further argument.

ARGUMENT IN SUPPORT OF MOTION

The Jurisdictional Statement filed with this Court is divided into three arguments. We respond to those arguments in the order in which they are presented.

1. The appellants attack the "food sales tax credit", Section 15(3)(a), L.B. 377, Laws of Nebraska, 1967, attached to the Jurisdictional Statement as Exhibit "B". It is contended that this provision is discriminatory against non-residents in violation of Article IV, Section 2, and the Fourteenth Amendment, Section 1, of the Federal Constitution. Appellants' arguments are based entirely upon cases involving state income tax laws where those laws provided for exemptions or benefits to residents solely on the basis of residence.

First, the appellants have not carefully read the Nebraska decision. The court there made clear that as it construes L.B. 377, the act itself establishes that the food sales tax credit is intended as a basic sales tax provision rather than an income tax provision. It points out therein that the $7.00 per qualified individual resident is not only allowed as a credit against the income tax payable, but is also allowed as a refund to the extent that the sales tax credit exceeds the income tax payable by the resident individual for the taxable year. It also provides that a resident individual shall be conclusively presumed to have paid "retail sales and use taxes imposed by this state equal to the maximum food sales tax credit allowable".

The court points out that it was the legislative policy to permit the credit or refund to be taken or claimed on the individual's state income tax return insofar as income tax returns may be required. For remaining cases, the refund is to be claimed on other forms. The court then points to the sound administrative reasons in support of the legislative policy decision, noting the inherent difficulties in administration and collection of taxes where certain foods are taxed and others are not.

The Nebraska court pointed out further that it would seem reasonable for the Legislature to determine that generally a state sales tax on food for personal use will be paid almost universally by residents of the state, while purchases of such foods in the state by non-residents are ordinarily minimal.

Thus, considered basically as a sales tax, it is perfectly logical and reasonable that the resident receive such credit or refund as the Legislature deems appropriate to take the place of foods not exempted in the sales tax law from the general classification of foods taxed. The Nebraska court draws attention to the difficulties of picking and choosing as to foods to be exempted. Those persons who are unable to claim their refund on the income tax returns are specifically permitted to do so by filing of the proper form.

It is certainly proper for the state's highest court to interpret its own tax legislation with respect to the nature of a particular tax. The cases of *Allied Stores of Ohio, Inc.* v. *Bowers*, 358 U.S. 522, 79 Sup. Ct. 437, 3 L. ed. 2d 480, and *Toomer* v. *Witsell*, 334 U.S. 385, 68 Sup. Ct. 1156, 92 L. ed. 1460, would seem to dispose of the question of the power of the state to classify in the manner in which it did in this instance since there is a logical and substantial reason for classification.

Take it one step further. If non-residents were to be given the benefit of a credit or refund under the sales tax on food, residents of surrounding states having no sales tax on food, or upon which there is a lesser tax upon such items, would receive a right in discrimination of the residents of the State of Nebraska, since they would be paying no sales tax or a lesser sales tax in

their own state and also receiving a credit on their income tax return against taxes on income earned from sources within Nebraska, or would be entitled to a refund from Nebraska. The right to protection against discrimination does not give the non-resident a right to gain favored treatment. *Shaffer* v. *Carter*, 252 U.S. 37, 40 Sup. Ct. 221, 64 L. ed. 445.

It was stated in *Madden* v. *Kentucky*, 309 U.S. 83, 60 Sup. Ct. 406, 84 L. ed. 590 that it is clear that "in taxation, even more than in other fields, legislatures possess the greatest freedom in the classification." This Court went on to say that the presumption in favor of the constitutionality of a state tax law can be overcome only by the most explicit demonstration that the classification adopted by the Legislature is a hostile and oppressive discrimination against particular persons and classes.

While the Nebraska court placed the nature of the "food sales tax credit" as a sales tax; it said that even if it assumed that such credit is a part of the income tax rather than the sales tax, the result should be no different. It pointed out that the "food sales tax credit" should logically be treated as a personal expense deduction, as opposed to a business expense deduction. The allowance of such credits or deductions constitute an exception to the general principle that personal living expenses are not allowed as deductions for income tax purposes. This philosophy follows that stated in *Goodwin* v. *State Tax Commissioner*, 286 App. Div. 694, 146 N.Y.S.2d 172 (1955), and followed in *Berry* v. *State Tax Commission*, 241 Ore. 580, 397 P.2d 780, 399 P.2d 164 (1964). Rather than supporting appellants' argument, the case of *Travis* v. *Yale & Towne Mfg. Co.*, 252 U.S.

60, 40 Sup. Ct. 228, 64 L. ed. 460 (1920), is the cited supporting authority for the holdings in the above stated decisions. That case considered the question of whether it was permissible within the constitutional provisions hereinbefore mentioned for a state to provide that its residents may claim deductions for certain personal living expenses while denying those deductions to non-residents earning income within the state. This is also the question that was considered in *Shaffer* v. *Carter*, *supra*. In both situations non-residents were permitted the same business deductions with respect to income from within the state. This Court upheld the classification. This Court in *Travis* v. *Yale & Towne Mfg. Co.*, *supra*, next considered a provision which purported to grant resident taxpayers an exemption of $1,000.00 in the case of a single person, $2,000.00 in the case of a married person, and $200.00 for each dependent. Non-resident taxpayers were not allowed any exemption. This Court held this to be unconstitutional as an unreasonable discrimination between residents and non-residents, based on no other reason than that non-residents were non-residents. The appellants rely on this second part of the *Travis* holding as analogous to the credit here. It is the first part of the holding which would be pertinent if the credit here discussed was a part of the income tax structure of Nebraska. In *State* v. *Ashby*, 73 N.M. 267, 387 P.2d 588 (1963), cited by the appellants, the situation was the same as in the second part of *Travis*. There was involved the same attempt to give a monetary credit against the income tax to residents while denying it to non-residents. In *Borden* v. *Selden*, 146 N. W. 306 (1966) there was involved an Agricultural Land Tax Credit extended to residential operators of agricultural lands in the State of Iowa as against non-residential operators. This again

was a tax based solely upon the consideration of residence and was held unconstitutional under the doctrine of the *Travis* case. The same comment may be made of the other cases cited by the appellants, both in this Jurisdictional Statement and the many other cases they have previously cited in the state courts for this same proposition.

The New York Court in *Goodwin* faced the same type of argument. It there said:

> "The petitioner's principle argument is that, by analogy to the decision of the Supreme Court in the case of Travis v. Yale & Towne Mfg. Co., 252 U.S. 260, 40 Sup. Ct. 228, 64 L. ed. 460, supra, holding the distinction between residents and non-residents with respect to exemptions to be invalid, the distinction as to deductions must also be held invalid. The analogy does not seem to us to be a sound one. Exemptions are allowed as a flat amount, without "regard to the making of expenditures of any kind by the taxpayer. A flat exemption, in connection with the graduated income tax, has a direct effect upon the rate of taxation. It excludes a part of the taxpayer's income from the tax base and it lowers the tax bracket into which his remaining income falls. Obviously it would be unconstitutional for New York State arbitrarily to tax the New York income of a non-resident at a higher rate than that applied to the income of residents. This is the substance of the holding of the Travis case.*"

2. Appellants' second argument is based upon the premise that the Nebraska Income Tax Act is an abandonment by it of its sovereignty in the legislative field. We think this point well answered in the Nebraska decision wherein it is pointed out that the constitutional amendment in Nebraska does not require, but only

authorizes, the Legislature to base a state income tax law upon the laws of the United States.

The Nebraska court pointed out that it permits the Legislature to use all, part or none of the laws of the United States as it may determine from time to time appropriate insofar as it may be lawful and practicable to do so, and that it does not preclude it from repealing its own present enactment or from adopting a completely different system. The Legislature retains the complete power to make such decisions.

While the appellants speak of it being in violation of the Federal Constitution for a state to adopt future federal laws, they must necessarily be referring to the principle referred to in *Carter* v. *Carter Coal Company*, 298 U.S. 238, 56 Sup. Ct. 855, 80 L. ed. 1160, wherein it was said that state powers can neither be appropriated on the one hand nor abdicated on the other. We merely point out that there cannot be said to be an abdication of the state legislative power when it, of its own choice, and with full control of the future of such choice, chooses to adopt federal laws as they exist or as they may be amended.

3. Appellants, by arguing that L.B. 377 in some manner violates the requirement of a "Republican" form of government, apparently refer to "representative" form of government. We find nothing in the decisions cited in the Jurisdictional Statement which in any manner suggests that the adoption of L.B. 377 has the effect of destroying the representative form of government in Nebraska. The cases cited by appellants and the arguments made by them clearly ignore that in the Nebraska situation we are dealing with an

amendment to the State Constitution which permits the Legislature to undertake the type of legislation embodied in L.B. 377. While it has been contended that the Federal Constitution prohibits the states from amending their constitutions to permit enactment of legislation existing and future federal laws, no citation of substance has ever been forthcoming. Without an abdication of sovereignty being involved, we fail to see how there can be Federal Constitutional objection.

CONCLUSION

It was incumbent upon the appellants to state a substantial reason for this Court's noting probably jurisdiction of this appeal. We respectfully submit that the decision of the Nebraska Supreme Court is so patently in line with the constitutional philosophy and the decisions of this Court that further argument in the case will serve no useful purpose.

Respectfully submitted,

NORBERT TIEMANN, *et al.*,
Appellees

CLARENCE A. H. MEYER,
Attorney General
GERALD S. VITAMVAS,
Deputy Attorney General
RICHARD H. WILLIAMS,
Special Assistant
Attorney General
Their Attorneys

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967.

ANDERSON ET AL. *v.* TIEMANN ET AL.

APPEAL FROM THE SUPREME COURT OF NEBRASKA.

No. 1218. Decided April 22, 1968.

PER CURIAM.

The appeal is dismissed for want of a substantial federal question.